

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 23,408

706

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DONALD E. DONOVAN,

Plaintiff-appellee,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

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BRIEF FOR THE APPELLANTS

STATEMENT OF THE ISSUE PRESENTED*

Whether the alleged failure of a government agency to train a probationary employee in accordance with the agency's handbook of instructions vitiates the employee's dismissal for inaptitude during the one-year probationary period.

* This case has not been previously before the Court.

REFERENCES TO RULINGS

The Memorandum-Order of the district court (App. 68-74) was entered on March 5, 1969, and is reported in 298 F. Supp. 674.

STATEMENT OF THE CASE

This is an action for reinstatement and back pay brought by a former probationary employee of the Federal Aviation Administration (hereafter the "F.A.A."). The defendants-appellants are the United States of America, the Secretary of Transportation and the Administrator of the F.A.A. The relevant facts may be stated as follows:

The plaintiff-appellee, Donald E. Donovan, received a career-conditional appointment on September 25, 1967, as a General Business and Industry Officer (G.S. 13 1/), Bureau of National Capital Airports, Federal Aviation Administration (App. 68). His duties involved working on the drafting of documents, such as the agency procurement manual, guidelines for the supervision of concessionaires at capital airports, etc. (App. 68-69). His appointment was subject to the usual one-year probationary period.

During the next seven months, serious questions arose concerning Donovan's ability to perform his duties

¹/ The starting salary for this grade at this time was \$12,873 (App. 2). At the time of Donovan's discharge it was \$14,409 (App. 3).

adequately. Consequently, a meeting was held on April 17, 1968, attended by Donovan and his superiors. The minutes of that meeting reflect that a candid discussion took place on the subject of Donovan's performance (App. 9-10):

During the meeting, Mr. Donovan was advised that Mr. Davenport [Donovan's immediate supervisor] had expressed serious doubts to Mr. Ormsbee [Davenport's immediate supervisor] and to Mr. Terris [a subordinate of Ormsbee] that he (Mr. Donovan) had the basic ability to attain anything beyond marginal or minimal performance. Upon questioning, Mr. Donovan stated his belief that he was capable of attaining satisfactory performance in his present position.

* * * * *

There was some discussion as to whether, in view of the dissatisfaction expressed with Mr. Donovan's work, Mr. Donovan now felt that he had a heavy enough background for this type of work. Mr. Donovan indicated that he felt his background was satisfactory for the job. * * * Mr. Donovan had indicated then [when he was hired], as now, that he was reasonably well skilled and felt at ease as a writer.

Several times during the meeting Mr. Donovan was asked whether he considered any of the discussions or actions taken as being unfair to him. Mr. Donovan replied that he did not but that, on the contrary, the discussions were good to "clear the air." * * *

Mr. Donovan stated that he had been with the Government for approximately 6 1/2 months and he anticipated that he would be able to "prove himself" within the next 3 1/2 months. He agreed that if he failed to do so with [sic -- should be "within"] the next 3 1/2 months,

the Government could remove him from the payroll. 2/

A second meeting was held on April 23, at which a detailed discussion took place on the substantive deficiencies in Donovan's work, with a view towards its improvement (App. 13-15). A letter was also sent to Donovan on that date, explaining the deficiencies in his work and noting an instance where he had taken unauthorized leave. This letter gave Donovan sixty days to improve the caliber of his work if he wished to avoid being separated from government employment before the end of his probationary period (App. 11-12).

Considerable correspondence followed between Donovan's attorney and his superiors (App. 21-30). Another conference was held to discuss these problems (App. 31). Finally, on July 5, 1968, within the one-year probationary period, Donovan was formally separated from government service, effective on July 26 (App. 34). The separation was made pursuant to a "probationary or trial period report." This report set out the same difficulties which had been brought out at the previous conferences: Donovan's lack of "ability to plan, develop, and express himself in sufficient depth, detail and completeness * * *"; his lack of "most of the basic skills and characteristics required

^{2/} The memorandum summarizing this meeting was approved by Donovan (App. 10).

to perform the functions of the position satisfactorily"; and the lack of thoroughness in his work, "resulting in incomplete, inaccurate and inadequate work products" (App. 32-33).

More correspondence followed, and the Civil Service Commission Appeals Examining Office eventually denied Donovan's appeal because it was not based upon any of the grounds set forth in the applicable regulations (App. 43). The Board of Appeals and Review affirmed (App. 62). Donovan then brought this action for reinstatement and back pay.

Both sides moved for summary judgment (App. 68). Attached to Donovan's motion were certain affidavits executed by him purporting to show that he had not been adequately trained in accordance with agency regulations (App. 50-54). Before answering these affidavits, the government moved to strike them as being entirely unrelated to the issues (App. 67). Immediately after the district court denied the government's motion to strike, it granted the plaintiff's motion for summary judgment (App. 1), so that no evidence was ever put on by the

government on this point. 3/

In its opinion, the court recognized that "there is no dispute over the procedural propriety of his [Donovan's] dismissal" once it was decided to dismiss him (App. 70). Moreover, there is no indication in the opinion that the court felt the agency was wrong in deciding that Donovan was unable to perform his duties satisfactorily. Rather, the court held that "the agency failed initially to follow its regulations providing for the supervision and training of employees and that in denying him these rights, it acted capriciously and arbitrarily. The decision of his superiors to discharge rather than to train him * * * was not lawful for the reason that it was in violation of the agency's regulations (App. 70-71). Therefore, the court granted Donovan's motion for summary judgment and denied the government's motions, and this appeal followed.

3/ The district court thus stated in his opinion that "there are no material facts in dispute" (App. 68). In its memorandum in support of its motion for reconsideration, the government pointed out that it had not had a chance to refute plaintiff's factual charges, and a counter-affidavit was attached (App. 75). Nevertheless, the motion for reconsideration was denied by the court (App. 79).

REGULATIONS INVOLVED

5 C.F.R., Chapter 1, Part 315, provides in pertinent part:

315.801 -- Probationary period; when required.

(a) The first year of service of an employee who is given a career or career-conditioned appointment under this part is a probationary period * * *.

315.802 -- Length of probationary period

(a) the probationary period required by § 315.801 is 1 year.

315.803 -- Agency action during probationary period (general).

The agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment.

315.804 -- Termination of probationers for unsatisfactory performance or conduct.

When an agency decides to terminate an employee serving a probationary or trial period because his work performance or conduct during this period fails to demonstrate his fitness or his qualifications for continued employment, it shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action. The information on the notice as to why the employee is being terminated shall, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct.

* * * * *

315.806 -- Appeal rights to the [Civil Service] Commission.

(a) Right of appeal. An employee is entitled to appeal to the Commission in writing from the agency's decision to terminate

him under § 315.804 or § 315.805 only as provided in this section. The Commission's review does not include any matter except as provided in paragraphs (b) and (c) of this section.

(b) On discrimination. An employee whose termination is subject to the provisions of §315.804 or §315.805 may appeal on the ground that the action taken was based on political reasons not required by statute * * *.

(c) On Improper procedure. A probationer whose termination is subject to § 315.805 [termination for conditions arising before appointment] may appeal on the ground that his termination was not effected in accordance with the procedural requirements of that section.

The F.A.A. Employee Performance Improvement Handbook (hereafter the "Handbook"), PT P 3400.2, November 17, 1964, 4/ provides in part:

CHAPTER 1. GENERAL INFORMATION AND POLICY

1. PURPOSE OF HANDBOOK. This handbook is a tool to further implement the Agency's Performance Improvement Program. It presents concepts and objectives to increase understanding of the Program's intent as well as detailed procedures under which it shall operate. The Handbook provides specific, how-to-do-it guidance for the supervisor to help him increase understanding between himself and his employees and to help his employees improve their performance. In addition, this handbook shows the supervisor how job performance standards help him review employee performance for such purposes as performance rating and certifying acceptable level

4/ The district court's opinion sets^{OUT} in full the provisions concerning F.A.A. Supervisors (App. 71-72). It is not clear from the opinion what citation was intended to be given for these provisions. In any event, these provisions are found in the 1964 Handbook, and there is no claim by the government that they did not apply to Donovan.

of competence.

* * * * *

CHAPTER 2. RESPONSIBILITIES FOR THE PROGRAM

10. F.A.A. SUPERVISORS. Each supervisor shall:

- (a) Develop job performance standards with each employee he supervises.
- (b) Systematically review performance and keep the employee informed as to his performance achievements.
- (c) Determine employee development needs and meet them as necessary by:
 - 1. Providing on-the-job counsel, instructions, and training.
 - 2. Requesting off-the-job training for the employee.
 - 3. Encouraging employee to study at his own expense.
 - 4. Arranging for assignments, such as job rotations, to provide additional experience.
- (d) As requested, use information gained from performance review in other personnel management programs.
- (e) Periodically review the performance standards for each employee he supervises and with him make appropriate changes in the standards.
- (f) While holding management positions, insure that, for employees in watchstanding positions and similar positions in which an employee may have different immediate supervisors from day to day, the number of supervisors is kept to a minimum. Management is encouraged to assign one supervisor to whom the employee looks for primary guidance within this program even though he may have several immediate supervisors in the course of a relatively short period of time.

ARGUMENT

GENERAL PROVISIONS CONCERNING THE TRAINING OF EMPLOYEES HAVE NO BEARING UPON THE PROPRIETY OF DISCHARGING A PROBATIONARY EMPLOYEE WITHIN THE PROBATIONARY PERIOD; THEREFORE, SINCE ALL PROCEDURAL REQUIREMENTS WERE MET, THE AGENCY'S ACTION SHOULD HAVE BEEN UPHELD.

INTRODUCTION

It should be noted at the outset that the district court did not hold that the agency had failed to follow the discharge regulations, i.e., the regulations dealing with termination during the probationary period. Moreover, Donovan has not raised the claim that these regulations violate a statute or are unconstitutional, or are inapplicable to him for any reason. Finally, we are aware of no dispute in this case regarding the agency's findings made pursuant to the discharge regulations -- Donovan has not alleged that the agency was wrong in determining that his work did not meet the standards required by his job.

Rather, the sole question in this case is whether general rules in an agency handbook concerning management's policy regarding the training of employees, which are unrelated in any way to employee discharge procedures in general or to probationary employees in particular, can be used by an unfit employee to prevent his discharge. We submit that the district court was plainly wrong in holding that such rules have a bearing upon the propriety

of this or any other termination of government employment.

A. There is No Support For the Incorporation of Rules Relating to the Training of Employees Into the Discharge Procedures For Probationary Employees.

The issue in this case, whether the alleged violation of the training requirements set out in the F.A.A. Handbook vitiates the discharge of a probationary employee, must be considered in the context of the nature of the Handbook provisions. The "Purpose of Handbook" provision (page 8, supra) very clearly sets out the reasons for the promulgation of these training requirements. They are: (1) to present "concepts and objectives to increase understanding of the [Agency's Performance Improvement] Program's intent as well as detailed procedures under which it shall operate"; (2) to provide "specific, how-to-do-it guidance for the supervisor to help him increase understanding between himself and his employees and to help his employees improve their performance"; and (3) to show "the supervisor how job performance standards help him review employee performance rating and certifying acceptable level of competence."

From the above, it is plain that the Handbook provisions were never intended to have the effect of conditions precedent to the application of discharge procedures to probationary or any other type of employees. They are simply internal instructions to F.A.A. management personnel

which urge them to carry out their functions in a prescribed manner.

It may well be that, if the Handbook provisions had required the fulfillment of certain training requirements before an employee's work could be rated deficient, a termination disregarding these requirements would be arguably invalid. See Vitarelli v. Seaton, 359 U.S. 535, 539 (1959); Service v. Dulles, 354 U.S. 363 (1957). However, neither Donovan nor the court below was able to point to anything in the Handbook even remotely suggesting that the right of the agency to remove a probationary employee is conditioned upon his having received counseling or training of any kind.

The only appellate cases on the rights of probationary employees lend support to the government's position that only the regulations covering the discharge of such employees are relevant in determining whether Donovan was wrongfully removed. See Medoff v. Freeman, 362 F. 2d 472 (C.A. 1, 1966); Jaeger v. Freeman, 410 F. 2d 528 (C.A. 5, 1969). In fact, the Fifth Circuit in Jaeger categorically rejected the probationary employee's argument that other "protections," namely those found in a union agreement providing for the settlement of employee-management disputes, should be applied. 410 F. 2d at 531-532. We know of no authority to the contrary.

Thus, the district court, without the benefit of any

language in the regulations or of any other authority, has decided that no agency may fire a probationary employee, however incompetent, unless it has attempted to train him first. This decision, we submit, has no basis under existing law. As we will now show, it is also totally at odds with the concept of efficiency in government employment, and would in addition eliminate the salutary effects of the probationary period.

B. Policy Considerations Militate Strongly Against the Establishment of a Training Prerequisite Before a Probationary Employee May be Discharged.

As pointed out in Medoff, supra, and Jaeger, supra, the whole point of the probationary period is to give the employee the chance to demonstrate his fitness before he obtains tenure, and to allow the government to observe him before it decides whether to keep him on. This procedure is followed with an extremely large number of employees every year. ^{5/} It allows the government to hire an employee without attempting to make an exhaustive and difficult study beforehand to determine the likelihood of his being able to perform his job adequately -- then, while the employee is on the job and easily observable, his supervisors can make up their minds within the one-year period. No one has ever suggested that this procedure

^{5/} We are informed that some 900,000 employees entered government service in a probationary status in the year in which Donovan was hired.

takes unfair advantage of employees -- rather, it has been in force since 1883 (Medoff v. Freeman, supra, 362 F. 2d at 474), and Congress has continued it in force even while exercising strict oversight in the area of federal employment.

Moreover, the impact of the holding below, that the failure to train an employee adequately has the effect of voiding agency personnel action, will not be limited to probationary employees. The training requirements cited by Donovan and set out in the opinion below apply equally to all F.A.A. employees. And, it must be presumed that many other agencies have similar programs. Thus, under Donovan's theory, few (if any) government employees may be fired in circumstances where, in the opinion of a district judge, the agency has not adequately "develop[ed] job performance standards"; "systematically review[ed] performance"; "determine[d] employee development needs"; provided "on-the-job counsel" or requested "off-the-job training," etc. (App. 71-72).

Not only does this theory result in court supervision of the internal day-to-day workings of every federal agency, but it raises a question of fact in every case where the employee feels he has not been adequately trained. Thus, in the instant case, despite the extensive evidence in the record that Donovan's deficiencies were apparent to

his supervisors and were discussed with him at great length (App. 9-10, 13-20, 31), the district court was able to find (apparently as a factual matter) that "the conferences which were held among plaintiff and his supervisors * * * fell far short of the training and supervision contemplated by the regulations" (App. 73).

We submit that it was never intended by Congress that the courts pass judgment upon the sufficiency of the training methods applied to each particular employee. The assumption of such a role would place an unmanageable burden on the courts. Nothing in any statute or regulation calls for such a result. Specifically, nothing in either the discharge regulations or the F.A.A. Handbook makes the receipt of training a prerequisite to the discharge of a probationary employee for incompetence. The court below was therefore wrong in so holding.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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BRIEF FOR APPELLEE

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLEE

STATEMENT OF ISSUES PRESENTED

1. Whether or not the Secretary of Transportation exceeded his authority in removing appellee so as to deny Due Process?
2. Did the District Court rightfully interpret the facts of this case in the light of Due Process?
3. Is training of probationary federal employees

*This case has not been previously before the Court.

in the practical realities of administration a mandatory function of the Government?

4. Whether a probationary federal employee can learn his duties in Government without adequate training?

5. Whether it is a positive executive function of Government to train a probationary federal employee?

STATEMENT OF CASE

This is a reinstatement case of a probationary federal employee, based on lack of due process and equal protection of the law.

Appellee, a member of the Army Corps Reserve from 1942 to 1944 was appointed a General Industry Officer, GS-13, \$12,873.00 per annum in the Federal Aviation Administration on September 25, 1967. (App. 3, 46)

That previously, he attended the University of Alaska and Bowling Green University, Ohio; that for ten years he was director of the Washington office and was responsible for all the functions of contract negotiations, planning and scheduling material to overhaul stations, U.S. Army Depots and U.S. Naval Air Stations; that he inspected material for quality control and replenishment of company inventory (7.5 million dollars). (App. 50)

On April 5, 1968, his superior, Jack Ormsbee, Chief Financial Management Staff, Bureau of National Capital Airports, called him into his office in Falls Church, Virginia and said:

"I suggest that you resign or they will bring charges against you."

Appellee was astonished and dumbfounded at this statement.

On April 17, 1968, he was called into the office of his immediate superior, David H. Davenport, Jr. who said:

"I will have to ask you to resign because they are going to bring charges against you."

"What charges?", asked Donald E. Donovan.

"I don't know.", said Davenport.

"I won't resign.", said Donovan.

"You will have a black mark against you," Davenport answered.

Appellee had not received any supervision in his duties. After he had been on the job for almost three weeks, he was assigned to rewrite, in order to fit the needs of the Capital Airports, the Federal Aviation Procurement Manual, which is approximately four inches thick.

He was also assigned to develop surveillance procedure for the Capital Airports in order to check the operation of the concessionaires. He was given approximately one hour's instruction for the project. (App. 3, 46-47. 51)

On January 30, 1968 appellee was recommended to take the official writing course of Federal Aviation Administration by David H. Davenport, because of alledged deficiencies in writing. The recommendation for the course was denied by Jack Ormsbee, Chief, Financial Management Staff. No other training or education was recommended. (App. 50-53, 53, 77)

That the said Jack Ormsbee used all his efforts to force appellee to resign his position, maliciously. (App. 52) The said Ormsbee exhibited ill-will toward appellee and was always critical of his work, but at no time did he recommend instruction or methods of improvement for appellee except at one meeting when it was recommended that David H. Davenport, appellee's immediate superior, work more closely with him.

The said David H. Davenport, Chief, Contract Management Branch, National Capital Airports, whose duty was to supervise and instruct appellee in his duties, gave appellee approximately one hour's instruction per month from September 25, 1967 to July 26, 1968. The said Davenport gave appellee no supervision.

David H. Davenport, appellee's immediate superior was absent from the office in the Bureau of National Capital Airports, Falls Church, Virginia for approximately eighty nine days (89) out of ten months from September 25, 1967 to July 26, 1968. (App. 34, 46, 47, 52).

That on March 15, 1968 appellee submitted a Concessionaire Performance Inspection Report which comments by management were not material to the ideas conveyed. (App. 53). Nor did he receive instruction on writing. He was never advised nor were arrangements made for him to undergo training and education under the Government Employees Training Act 5 U.S.C. §4101 et, seq.

He was never interviewed or instructed on Employee Performance Improvement except when he received a letter of warning. At no time did he receive:

- (a) Program guidance
- (b) Staff assistance on promoting the program and developing standards
- (c) Coordination of development of performance standard
- (d) Evaluation of the effectiveness of the program
- (e) Developing job performance standard
- (f) Systematic review of performance
- (g) Determination of employee development needs and meeting them as follows:
 - 1. On the job counsel, instructions and training
 - 2. Requesting of the job training for employee
 - 3. Encourage employees to study at his own expense
 - 4. Arranging for additional experience

Appellee at all times endeavored to improve his performance requirements and to achieve the results expected. (App. 54)

On July 5, 1968, appellee received a letter, signed by Jack Ormsbee, Financial Management Staff, Bureau of National Capital Airports, Federal Aviation Administration stating that on July 26, 1968 he would be separated: "Termination During Probation".

On July 26, 1968, his employment was terminated. He appealed to the Federal Aviation Administration and the U.S. Civil Service Commission which both denied relief.

PROCEEDINGS BELOW

This action was filed on September 12, 1968 in the United States District Court for the District of Columbia Civil Action No. 2307-68, seeking a declaratory and mandatory injunction, ordering the Administrator of the Federal Aviation Administration to reinstate appellant in his position as Business Industry Officer (App. 2-7). The Court below, Judge Gasch, granted appellee's motion for summary judgement and denied appellant's motion to strike and summary judgement. (App. 67, 68-74). This appeal followed. (App. 80).

STATUTES AND REGULATIONS INVOLVED

United States Constitution, Fifth Amendment

Federal Aviation Act of 1958, §313 (d), 49 U.S.C. § 1354 (d)
Government Employees Training Act of 1958, 5 U.S.C. § 4101-4118
Civil Service Act of January 16, 1883, 5 U.S.C. §3321
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F A A Handbook, 3430.2, Employee Appraisal Consolidation

SUMMARY OF ARGUMENT

Appellee, Donovan, contends that appellant's argument is not responsive to the discharge procedure as to substantive due process and equal protection of the laws.

The Secretary of Transportation and the Administrator, Federal Aviation Administration rely on procedural due process and stare decisis of the Civil Service Act of January 16, 1883 in relation to probationary employees.

Appellee further contends that Government Employees Training Act of 1958 and the Federal Aviation Act of 1958 expanded the training authority conferred on the Administrator, which has been further strengthened and enlightened by executive direction and congressional authorization. Guidelines have been set up in Handbooks, by the Administration which are commanding.

ARGUMENT

I. APPELLANT'S ARGUMENT IS NOT RESPONSIVE TO SUBSTANTIVE DUE PROCESS ASPECT OF THE DISCHARGE PROCEDURE.

The thrust of the appellant's case is the procedural due process has been carried out by the Government, therefore there is no issue. Also that we should revert back to the Civil Service Act of 1883.

However, the Court below, Judge Oliver Gasch took a deeper view as is shown by his penetrating questions.

"The Court: Is the Handbook to be equated with a regulation?

"Mr. Dalton: Yes, Your Honor. I can point that out.

"The Court: That is the Hironimus case that says that?

"Mr. Dalton: No, Your Honor, it does not say that. It says that the Administrator must observe the laws and regulations.

"The Court: I understand that. That was the Roberts case that Mr. Hannon and I debated at some length.

"Mr. Dalton: Yes, Your Honor, Vance v. Roberts.

"The Court: And that is what that case holds, but I am wondering whether there is any authority for the proposition that an agency Handbook is to be viewed in the same light as agency regulations?

"Mr. Dalton: Your Honor, the closest thing, the Supreme Court has just ruled, about two weeks ago, in Thorpe v. Housing Authority, January 15, 1969, that a circular from HUD could change the regulations of the Housing Authority in Durham, North Carolina.

"Mr. Dalton: Does that answer your Honor's question?

"The Court: At least it was held to be binding upon the agency; having promulgated this directive, the agency had to follow it?

"Mr. Dalton: That's right. That was only a circular." (Tr 13-14)

1

In support of Judge Gasch's opinion are the training directives of the F.A.A., and the analogy present in University education. The Government cannot limit itself to a narrow channel and say we have complied with the probationary section of the Civil Service Act of 1883, 5 U.S.C. § 3321, our obligations are finished. It is a too narrow concept.

The Government's argument that we should narrowly interpret the Civil Service Act of 1883 echoes the words of Hamlet,

"Now see that noble and most sovereign reason
Like sweet bells jangled out of tune and harsh."

Dr. Andrew W. Cordier, President of Columbia University in a speech on December 14, 1969 stated:

"But the stakes in society are too large, including the destruction of civilization as we know it, for the university to limit itself exclusively to the refinement of knowledge and the extension of knowledge within its own laboratories and classrooms. It of course makes its major contribution to society through the quality of its professorial expertise and intellectual effectiveness of its training of students who soon become partners in society."

In 1883 the Supreme Court of the United States decided

"The Civil Rights Cases." Decided October 15, 1883. 109

U.S. 3. These cases involved indictments, "for denying to

1 Donovan v. U.S., 298 F. Supp. 674 (D.C. DDC. 1969)

persons of color the accommodation and privileges of an inn or hotel," an information, "for refusing a colored person a seat in the dress center for Moguire's theatre in San Francisco"; an indictment, "for denying to another person, whose color is not stated, the full enjoyment of the accommodation of the theatre known as the Grand Apex in New York."

The Court stated:

On the whole; we are of the opinion that no countenances of authority for the passage of the law in question can be found in either the thirteenth or fourteenth amendments of the Constitution; and no other ground of authority for the passage being suggested it must necessarily be declared void at least so far as its operator in the several states is concerned." 109 U.S. 3, 25. (1883)

How far away are those cases from the decisions of the Supreme Court today! How history should be used in deciding cases is ably presented by Charles A. Miller in The Supreme Court And The Uses of History, Belknap Press of Harvard University Press, Cambridge, Mass. (1969).

II. THE JUDGEMENT BELOW IS IN ALL RESPECTS CORRECT, WELL REASONED, AND IN ACCORDANCE WITH LAW

Judge Gasch in his Memorandum Order of March 5, 1969 stated:

The Government draws from this, however, the conclusion that where an employee is discharged during the probationary period for the announced reason that he lacks basic skills, the discharge cannot be arbitrary and capricious and cannot be reviewed. The error in this conclusion is that the agency has materially qualified its position by ordering that supervisors will follow particular

procedures in the training and assistance of employees on new assignments. These procedures must be followed and may be reviewed by the Court. An administrator may not pick and choose among those regulations, he is instructed to follow. If a discharge is effected without strict observance of applicable regulations, that discharge is unlawful.

Appellants raise the issue of Medoff v. Freeman, 362 Fed.2d 472 (C.A. 1, 1966) and Jaeger v. Freeman, 410 Fed.2d 528 (C.A. 5, 1969).

In Medoff, supra, the issue raised is a probationary employee entitled to a letter of charges and a right to reply, a hearing and right of confrontation? These are not the issues here.

In Jaeger, supra, the issue raised, is a probationary employee entitled to a trial type hearing? This is not the issue here.

In Donovan, the simple issues are due process and equal protection of the laws as to the rights of a probationary employee and the duties of management to supervise and train employees in this complex organization called the federal government. These are rights under the Fifth Amendment.

The timeliness of Judge Gasch's decision is seen in the complex American Government of today as stated by Donald R. Harvey:¹

"With the tremendous expansion of government in the 1930's and 1940's however,

¹ The Civil Service Commission, Praeger, Washington, 1969, p 83.

came the realization that the knowledge of employees must be continually updated as science and technology advanced and as the demands of society became more complex."

In Europe, public administrators demand proper training.

1

Brian Chapman states:

"Specialized training for officials in some public services has been common for many years. If an official is required to show special skills in fields reserved to government action, it is only natural that the state should train him."

III. THE SECRETARY EXCEEDED HIS POWER OF REMOVAL OF A PROBATIONARY EMPLOYEE WHEN HE DENIED DUE PROCESS

The secretary was required under the provisions of the F.A.A. Handbook, 3430.2, 1/6/66, to determine as follows:

"4. Determination of Training Needs

To help in planning formal (and informal) training programs, the supervisor must evaluate employee performance- what elements of his performance could be improved through training? Determining employee training needs is a positive supervisory requirement." (Underlining supplied.)

This was never done. See affidavits of appellee (App 50,53).

Under the provisions of the F.A.A. Handbook, PTP 3400.2, Employee Performance Improvement, the supervisor must carry

1 The Profession of Government, Macmillan, New York, 1959.

out the following requirements, as stated in paragraph 10, pages 7-8 in pertinent part:

"Each supervisor shall:

- (a) Develop job performance standards with each employee he supervises.
- (b) Systematically review performance and keep the employee informed as to his performance achievements.
- (c) Determine employee development needs and meet them as necessary by:
 - 1. Providing on-the-job counsel, training and instructions.
 - 2. Requesting off-the-job training for the employee.
 - 3. Encouraging employee to study at his own expense.
 - 4. Arranging for assignments, such as job rotations, to provide additional experience.
- (d) As requested, use information gained from performance review in other personnel management programs.
- (e) Periodically review the performance standards for each employee he supervises and with him make appropriate changes in the standards.
- (f) While holding management positions, insure that, for employees in watchstanding positions and similar positions in which an employee may have different immediate supervisors from day to day, the number of supervisors is kept to a minimum. Management is encouraged to assign one supervisor to whom the employee looks for primary guidance within this program even though he may have several immediate supervisors in the course of a relatively short period."

"Shall" in the regulation is used in a mandatory and command sense.

"Shall" is the ordinary word used in connection with a mandate. City of Lebanon v. Dale, 46 N.E. 2d 269, 272,

113 Ind. App. 173.

The presumption is that "shall" in a statute is used in an imperative sense. Utilities Engineering Institute v. Bodenstein, 29A 2d. 197, 199, 129 N.J.L. 249.

The observance and execution of the above functions of the supervisor were not carried out by David Davenport or Jack Ormsbee, appellee's supervisors. In fact, David Davenport was out of the office for 89 days from September 25, 1967 to July 26, 1968! See affidavit of appellee (App. 52). Mr. Davenport was not in the office sufficiently to supervise and instruct appellee.

The Government Employees' Training Act, 5 USC, Chapter 41, sets out the training requirements of the Federal Government. Supplementing this, the President issued Executive Order 11348, April 20, 1967 32 F.R. 6335, Further Training of Government Employees which states at Sec. 102:

"Sec. 102. It is the policy of the Government of the United States to develop its employees through the establishment and operation of progressive and efficient training programs, thereby improving public service and increasing efficiency and economy building and retaining a force of skilled and efficient employees and installing and using the best modern practices and techniques in the conduct of Government business."

Under E. O. 11348, the Federal Aviation Agency is required to "foster employee self-development by creating a work environment in which self-development is encouraged, by

assuring that opportunities for training and self-study materials are reasonably available." Also the agency is to establish and make full use of Agency facilities for training employees. (See exhibit attached.)

Timely, the issue raised here has been decided by the Supreme Court of the United States in Thorpe v. Housing Authority, No. 20, October Term, 1968, Decided January 13, 1969, 393 U.S. 268, 21 L. Ed. 2d 474 89 S. Ct. 518.

"Shall" in the regulation is used in a mandatory sense. F.A.A. Handbook 3430.2, 1/6/66 states emphatically that:

"Determining employee training need is a positive supervisory requirement."

The Thorpe case, supra, involves an eviction of a tenant in a federally assisted housing project. Can the tenant be evicted prior to notification of eviction and without an opportunity to reply to those reasons, when such procedure is provided in a HUD Circular issued after eviction.

The circular imposes only one requirement - a simple notification procedure before evicting tenants.

The Housing Authority contends that the circular on its face is only advisory.

Chief Justice Warren in Thorpe v. Housing Authority, No. 20, October Term, 1968, Decided January 13, 1969, stated in reference to the above contention:

"We reject each of these contentions."

The Secretary of Transportation selected what laws he would obey and ignored the primary requirements of a new employee-supervision and instruction. The Secretary is unjustified in not supervising and instructing appellee.

Donovan was denied the equal protection of the laws, which applied to the federal government under the due process clause of the Fifth Amendment.

In Bolling v. Sharpe, 347, U.S. 497, 98 L Ed. 884 74, S. Ct. 693, Mr. Chief Justice Warren stated:

"The Fifth Amendment which is applicable to the District of Columbia, does not contain an equal protection clause, as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law' and, therefore, we do not imply that the two are always interchangeable phrases. But as this Court has recognized, discrimination may be so unjustifiable as to be violation of due process."
(Ibid p. 499)

IV. REGULATIONS VALIDLY PRESCRIBED BY A GOVERNMENT ADMINISTRATOR ARE BINDING ON HIM AS WELL AS
THE CITIZEN

Clearly the Federal Aviation Administration has completely ignored the supervision and instruction requirements of the following regulations and laws:

1. Agency Handbook PTP 3400.2, Employee Performance Improvement
2. Agency Handbook 3410.4, Career Planning Program

3. Agency Handbook 3430.1, Employee Performance Rating
4. Agency Handbook 3430.2, Employee Appraisal Consolidation
5. Government Employees Training Act, (Public Law 85-507, July 7, 1958), 5 USC Sec. 4101-4118

It is too late in the day for the administrator to ignore his leadership duties as prescribed by the regulations. Changes in the "living world" show that at our universities, students are now on committees with the faculty and university administrators, making rules, selecting courses and advising on all aspects of university life, even to what building will be erected. See Exhibit attached on Princeton University (App. 59). See President Andrew Cordier of Columbia University speech, *supra*: also, Chapman's, *The Profession of Government*, *supra*.

Personal practices in the removal of Donald Donovan, show the denial of duty of training regulations in force in the Administration for the probationary employee.

The Courts have ruled that Army regulations issued in accordance with the law have the force of law. Hironimus v. Durant, 168 F 2d. 288. Spencer v. U.S., 121 Ct. Cl. 558, 102 F Supp. 744, certiorari denied 73 S. Ct. 29.

A valid administrative regulation binds the administrator himself equally with others, just as if provisions were prescribed in terms by statute. School Dist. 2 Fractional, Athens Tp., Calhoun County, Mich. v. U.S., 229 F 2d. 681 U.S. v. Finn, 127 F. Supp. 158, modified 239 F 2d. 679.

The Secretary of the Interior is bound by his own regulation so long as it remains in effect since it has the force of law. McKay v. Wahlenmaier, 226 F 2d. 35, 96 U.S. App., D.C. 313.

Mr. Justice Harlan in Service v. Dulles, 354 U.S. 363, 1 L Ed. 2d. 1403, 77 S. Ct. 1152 states:

"That regulations validly prescribed by a government administrator are binding upon him as well as the citizen and that this principle holds even where the administrative action under review is discretionary in nature." Ibid 354, U.S. 363, 372.

See also Watson V. United States, 162 F. Supp. 755, 142 Ct. Cl. 749; Clackum v. United States, 296 F 2d. 226, Ct. Cl. No. 246-56.

Under the circumstances the removal of appellee is null and void. In issuing the discharge, the Secretary acted in excess of his powers. Harmon v. Brucker, 355 U.S. 579, 78 S. Ct. 433; Davis v. Brucker, 107 U.S. App. D.C. 152, 275 F 2d. 181; Services v. Dulles, supra.

V. APPELLANTS MISCONSTRUE THE SCOPE OF JUDICIAL REVIEW

Under the Constitution (Art. II, Section 2, Clause 2)

the powers of the President in respect to the Executive Department are subject to Congressional control, Myers v. United States, 272 U.S. 52 at 121; Humphrey v. United States, 295 U.S. 602; Powell v. Brannan, 196 F 2d. 871; Bailey v. Richardson, 182 F 2d. 46.

The cases cited by appellants do not speak to the Constitutional questions of the substantive due process. No Constitutional questions are raised in Medoff v. Freeman, 362 F 2d. 472 (C.A.1, 1966). In Jaeger v. Freeman, 410 F 2d. 528 (C.A. 5, 1969), the issue raised was whether a probationary employee was entitled to a hearing on removal. The issue raised herein was not before the Court previously in any case.

Appellants contend that appellee is requesting the Court to determine his qualifications for the job, but this misconstrues appellee's case.

Appellee's work reports have been criticized for his use of words, grammar, etc. See Appellants Exhibits - "Concessionaire Performance Inspection." (App. 16)

For example:

1. Appellee stated in the above exhibit:

"Concerning contract responsibilities."

This was changed to read:

"Subj. Assignment of Contractors Responsibilities."

2. Appellee stated in the above exhibit:

"The purpose of this Order is to formalize procedures, policies, authority and responsibility for conducting surveillance of contract."

This was changed to read:

"The purpose of this Order is to establish procedures and policies and to determine the authority and responsibility of (unreadable) personnel for conducting surveillance contract."

No wonder John Macy, Chairman of the Civil Service

Commission stated:

"Now, the 'war on gobbledegook.' It is a war we are going to continue from now on under a different banner and under different points of emphasis. But we have a new charge, all of us, to see what we can do to communicate more crisply, more exactly, more interestingly to the American Public." (Address at the Government Public Information luncheon, June 18, 1965, Washington, D.C., quoted in Civil Service Journal Vol. 6, No. 1, July-September, 1965.)

Clarity, conciseness, directness, and comprehension are needed in Government correspondence, not gobbledegook.

The charge of lack of writing ability is without merit.

The thrust of appellee's case has been well expressed by Judge Clark in Reynolds v. Lovett, 201 F 2d. 181, who stated:

"In my judgement, the defiance of the law and disregard of the will of Congress on the part of administrative bureaucrats is a greater menace to our institutions than the threat of the atomic bomb."

In summing up, basic considerations lead us to conclude that the removal of appellee was arbitrary, capricious and illegal. The reinstatement of Donald Donovan by Judge Oliver Gasch was a well reasoned and correct decision.

CONCLUSION

That the judgment below be affirmed.

Respectfully submitted,

Donald H. Dalton
Attorney for Appellee

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,408

DONALD E. DONOVAN,
Appellee

v.

UNITED STATES OF AMERICA, et al,
Appellants

FAA PUBLICATIONS FOR CONSIDERATION
WITH APPELLEES BRIEF FILED IN ACCORDANCE
WITH FEDERAL RULES OF APPELLATE PROCEDURE

Attached are official FAA Handbooks referred to in
appellee's brief for consideration by the Court, in accordance
with Federal Rules of Appellate Procedure, Rule 28 (f).

The Handbooks attached are designated:

1. PTP 3400.2
2. 3410.1
3. 3430.2
4. 3430.1

Respectfully submitted,

Donald H. Dalton
Attorney for Appellee

ORDER

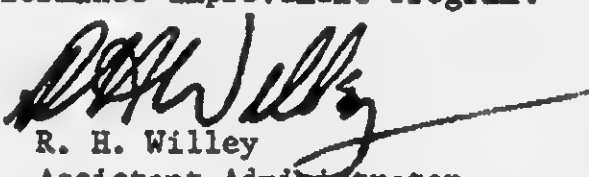
FEDERAL AVIATION AGENCY
WASHINGTON, D. C.

PT P 3400.2

11/17/64

SUBJ: EMPLOYEE PERFORMANCE IMPROVEMENT HANDBOOK

1. PURPOSE. This order transmits an FAA handbook for the Agency's Performance Improvement Program, a part of the Agency's total Career Planning Program. The handbook constitutes one of a planned series of directives each of which will describe a portion of the career planning system.
2. REFERENCES.
 - a. Agency Order OA 3410.3, Performance Improvement Program.
 - b. Agency Order OA 3410.1, FAA Career Planning Program.
 - c. Agency Handbook PT P 3430.1, Performance Rating.
 - d. Agency Order PT 3550.7, Acceptable Level of Competence for Within-Grade Increases.
 - e. Agency Handbook, PT P 3010.1, Training Requirements and Programming.
 - f. Agency Handbook PT P 3330.1A, Merit Promotion Program.
 - g. Agency Handbook PT P 3450.2A, Recognition and Awards Program.
 - h. Agency Order SM 3400.2, Uniform Performance Improvement Program Standards.
 - i. Agency Order AT 3410.1, Performance Improvement Program.


R. H. Willey
Assistant Administrator
for Personnel and Training

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CHAPTER 1. GENERAL INFORMATION AND POLICY

1. PURPOSE OF HANDBOOK. This handbook is a tool to further implement the Agency's Performance Improvement Program. It presents concepts and objectives to increase understanding of the Program's intent as well as detailed procedures under which it shall operate. The handbook provides specific, how-to-do-it guidance for the supervisor to help him increase understanding between himself and his employees and to help his employees improve their performance. In addition, this handbook shows the supervisor how job performance standards help him review employee performance for such purposes as performance rating and certifying acceptable level of competence.
2. POLICY. The Federal Aviation Agency requires each supervisor to develop written standards of performance with each of his employees and periodically discuss with them their performance in comparison with the standards, so that his employees can improve the quality of their performance and constantly and consciously work toward improving their on-the-job effectiveness and productivity.
3. DEFINITION OF PERFORMANCE IMPROVEMENT PROCESS. The performance improvement process is a tool for increasing an employee's effectiveness and efficiency on the job, thereby increasing his overall value to the Agency and service to the public. In this process the supervisor and the employee together:
 - a. Develop a common understanding of the results expected of the employee as he performs his job.
 - b. Frequently discuss the employee's performance.
 - c. Determine means to improve the whole work situation and ways for the employee to improve his performance.

The supervisor follows up on how well the employee is improving and counsels the employee as appropriate.

4. BASIC CONCEPTS. Improved performance, described in this handbook, is achieved through a process that differs from that generally practiced by supervisors in the past. In the past, the supervisor alone was expected to establish group and individual goals and performance standards. This was done primarily to evaluate performance and to help the employee perform at an acceptable level. In contrast, the Performance Improvement Program calls for a joint effort between the employee and his supervisor. The employee participates to the greatest extent possible in recognizing the objectives of his work and the results to be achieved. This is done primarily to

help the employee improve his performance regardless of how well he is performing. With his supervisor, the employee also identifies roadblocks to effective performance, ways to overcome them, and methods of doing his job better. More specifically, the performance improvement process is based on the ideas that:

- a. The employee gains greater job satisfaction when his work fully requires of him what he's capable of bringing to it.
- b. A way to significantly improve the efficiency of the Agency's operations and to increase overall productivity is to help each employee view his job not as an end in itself, but as a responsibility to be carried out as part of a larger team effort.
- c. Performance improvement is better achieved when supervisor and employee mutually recognize each other's responsibilities, those of others with whom they work, and how all of these responsibilities are related in the accomplishment of the Agency's mission.
- d. Group and individual accomplishment is increased when achievements can be measured against specific results expected of the group or individual work efforts.
- e. An employee can better improve his work performance when he knows how well he is meeting work requirements and when positive action is taken by him and his supervisor to approach areas needing improvement as a problem solving challenge rather than an employee deficiency.
- f. The supervisor can improve his own managerial performance when he has a sound means of assessing the work capabilities of individual employees and the changes they need in the work situation for improved performance.

5. OBJECTIVE. The overall objective of the program is to make the needs of the employee more compatible with the goals of management.

a. Basic Objectives.

- (1) A primary goal of management is to improve continually the Agency's service to the public by increasing the effectiveness, efficiency, and economy of operations. This is done largely through helping each employee increase his individual productivity.

- (2) A primary need of the employee is job satisfaction, a sense of personal worth which can come from knowing he is contributing service of real value in proportion to his capabilities. This job satisfaction is most completely obtained through his having:

- (a) A clear understanding of what is expected of him.
- (b) Effective help to overcome job problems and obstacles which may stand in the way of his achievement.
- (c) A means to identify and provide for the training and experience he may need to perform at a higher level.

b. Other Objectives. Other specific objectives of the program are:

- (1) Strengthening supervisor-employee relations by providing a sound basis for establishing a basic understanding and mutual respect and for resolving conflicts or differences which arise between them. That is, through the performance improvement process, discussion can center on the JOB and requirements for effective performance rather than on the PERSON and his deficiencies.
- (2) Enabling the supervisor to manage by objectives which the employee has had a part in setting and therefore a personal stake in achieving.
- (3) Otherwise improving supervisory practices as may be indicated to the supervisor through his discussion with the employee.
- (4) Obtaining increased group and individual efficiency through improved performance.
- (5) Helping each employee become more conscious of his job responsibilities and what he is expected to contribute in achieving his group's objectives.
- (6) Assisting the supervisor and the employee in developing a greater mutual understanding of just how well the employee is performing; and in particular, identifying areas of performance which warrant special attention and action, such as formal recognition of deserving performance or planned self-development in other areas in which performance needs to be improved.

11/17/64

- (7) Providing a basis for helping the employee with his long-range career planning and obtaining information needed both about the employee's job and about his knowledges, abilities, and long-range career potential. All these are needed to further the Agency's career planning effort.

6. RELATION TO OTHER PROGRAMS. The Performance Improvement Program is designed to help the employee improve his performance - NOT TO APPRAISE HIM. However, having standards does enable the supervisor to do a better job of reviewing the employee's performance whenever an appraisal is required. Therefore, he will find it helpful to use the performance standards developed under the Performance Improvement Program for any purpose or program requiring appraisal of employee performance. He must be careful to use these standards in such a way for these other purposes that he does not jeopardize their effectiveness in improving performance. Neither the Performance Improvement Program as a whole nor any of its parts replace any other program. Establishing standards and developing greater rapport, fostered by the performance discussion, support the supervisor in other personnel management programs and strengthen his ability to meet certain requirements, such as (Illustrated in Appendix 1)

- a. Performance Rating Act of 1950. This Act requires the supervisor to rate his employee's performance "Satisfactory," "Unsatisfactory," or "Outstanding." The primary aim of the Agency's Performance Improvement Program is not to rate an employee but help him improve his performance. The two programs are often confused with each other. Therefore, it is important to explain further why the Agency's Performance Improvement Program is not the same as the Performance Rating Act. Both are designed to help the employee improve his performance through increasing his communication with his supervisor. However, the means of accomplishing this aim are quite different.

There has been much research in industry and some in government to show that the means provided the supervisor under the Performance Rating Act are not as effective as those outlined in the FAA's Performance Improvement Program.

Under the Performance Rating Act the means required by law emphasize appraising the employee. The supervisor appraises the employee, assigns him a rating, and discusses his rating with him. If improvement is necessary - i.e. performance is less than satisfactory in any area the supervisor points out what needs to be done to improve performance. This is all done in a climate of judging.

However, under the Performance Improvement Program, the means emphasize employee development REGARDLESS OF HOW WELL HE IS PERFORMING EVEN IF HE IS PERFORMING IN AN OUTSTANDING MANNER. The supervisor and employee together identify and discuss job problems

and roadblocks which might keep the employee from performing at a higher level. Together they solve the problems and determine what needs to be done to eliminate the obstacles. Together they plan action to help the employee improve his performance.

The performance improvement process described in this Handbook is not a means to tell the supervisor about a better way to accomplish the objectives of the Performance Rating Act. The process when removed from a "rating atmosphere" induces self-motivation to improve, development and growth, and genuinely improved communications. If attached to the "rating atmosphere" the process is apt to continue to induce such frequent results of the Performance Rating Act as anxiety, temporary improvement through fear, and change only to meet the supervisor's requirements.

However, when properly used, the performance improvement process can make the required performance rating more meaningful through the establishment of a better understanding of the results expected of the employee's work. The employee's progress in achieving these expectations can be used to measure and rate performance. The performance improvement process aids in a number of other programs starting with "b" below. These other programs would not be so effectively aided under a "rating atmosphere." For these reasons the Performance Improvement Program is detached from the Performance Rating Act even though it may be useful in assigning the required performance rating.

- b. Certifying Acceptable Level of Competence. Under the Pay Reform Bill of 1962 the supervisor must certify that each employee is performing at an acceptable level of competence. This is done each time the employee becomes eligible for an in-grade pay increase. Having performance standards provides the supervisor with a basis for measuring performance to judge his level of competence.
- c. Career Planning. Requires taking stock of knowledges and abilities in terms of the Agency's current and future requirements and Agency employees' current and future potentials. Performance standards help identify the knowledges and abilities required for effective performance of managerial, administrative, and technical jobs. The performance discussions provide a basis for obtaining information about the quantity and quality of knowledges and abilities the Agency has in its employees.
- d. Merit Promotion Program. An employee demonstrates his capability most conclusively through his job performance. Having specific performance standards helps sharpen the quality of the supervisor's subjective judgment of that performance. The process of developing

standards increases the supervisor's knowledge of the requirements of jobs he supervises. This will provide him an objective basis for measuring performance and can help the supervisor see more clearly the employee's strengths on the job and his potential for advancement.

- e. Determining Training Needs. Having standards and reviewing the employee's performance against them, enables the supervisor to identify the employee's development needs. The whole performance improvement process encourages the supervisor and employee to identify specific ways to increase knowledge and improve ability and work methods.
- f. Manpower Control and Utilization. The establishment of standards in the manner suggested in the Handbook provides a system for critically appraising Agency position requirements and a climate conducive to realistically evaluating future needs. The Performance Improvement Program provides an excellent means to help the employee increase his productivity.
- g. Recognition and Awards Program. Especially noteworthy is that performance standards provide a means to more objectively measure work performance. They will thus provide the specific information necessary to show how an individual's efforts have clearly exceeded the requirements of his job. Standards should also provide a valid basis for measuring the degree and extent of improvement in efficiency and economy of operations on which awards should be based.

CHAPTER 2. RESPONSIBILITIES FOR THE PROGRAM

7. THE DEPUTY ADMINISTRATOR, in keeping with paragraph 4 of Agency Order OA 3410.3, Performance Improvement Program, is responsible for conducting the program for the Regulatory Council and all the other offices that report directly to the Office of the Administrator. The Deputy Administrator shall:
 - a. Keep employees and supervisors informed as to how performance improvement activities are to be carried out.
 - b. Establish, as necessary, appropriate policies and procedures consistent with the program objectives as outlined in this Handbook.
 - c. Periodically evaluate the effectiveness of the program within his area of immediate jurisdiction.
8. THE ASSOCIATE ADMINISTRATORS, THE DEPUTY ADMINISTRATOR FOR SUPERSONIC TRANSPORT DEVELOPMENT, THE REGIONAL DIRECTORS, AND THE MANAGERS OF THE AERONAUTICAL CENTER AND NAFEC, in keeping with paragraph 4 of Agency Order OA 3410.3, Performance Improvement Program, are responsible for conducting the program within their areas of jurisdiction. The duties of each of these officials are the same as those indicated for the Deputy Administrator in paragraph 7 above.
9. THE ASSISTANT ADMINISTRATOR FOR PERSONNEL AND TRAINING shall:
 - a. Provide overall program guidance.
 - b. Provide staff assistance in promoting understanding of the program, including how to develop standards and use them effectively.
 - c. Coordinate the development of performance standards at the national level, such as those developed for certain major occupational groups.
 - d. Assist in evaluating the overall effectiveness of the program.
10. FAA SUPERVISORS. Each supervisor shall:
 - a. Develop job performance standards with each employee he supervises.
 - b. Systematically review performance and keep the employee informed as to his performance achievements.
 - c. Determine employee development needs and meet them as necessary by:
 - (1) Providing on-the-job counsel, instructions, and training.

- (2) Requesting off-the-job training for the employee.
 - (3) Encouraging employee to study at his own expense.
 - (4) Arranging for assignments, such as job rotations, to provide additional experience.
- d. As requested, use information gained from performance review in other personnel management programs.
 - e. Periodically review the performance standards for each employee he supervises and with him make appropriate changes in the standards.
 - f. While holding management positions, insure that, for employees in watchstanding positions and similar positions in which an employee may have different immediate supervisors from day to day, the number of supervisors is kept to a minimum. Management is encouraged to assign one supervisor to whom the employee looks for primary guidance within this program even though he may have several immediate supervisors in the course of a relatively short period of time.
11. FAA EMPLOYEES. Each FAA employee is responsible for knowing the duties and performance requirements of his position and for achieving the results expected. He shall:
- a. Assist in formalization of performance standards for his position.
 - b. Conscientiously attempt to improve his performance to meet or exceed established standards.
 - c. As much as it is possible for him to do so, keep informed as to whether he is achieving the results expected.
 - d. Suggest revisions to the standards based on his experience with them.

CHAPTER 3. ESTABLISHING PERFORMANCE STANDARDS

12. DEFINITION OF A PERFORMANCE STANDARD. A performance standard is a COMMON UNDERSTANDING between the supervisor and his employee as to the key result areas of his job and the results expected when the employee is performing in a desirable manner. To facilitate and sharpen thinking in developing this understanding, performance standards shall be recorded as they are developed. Writing them down makes the understanding clearer and less likely to be misinterpreted or forgotten later on.

However, a performance standard is NOT to be interpreted as THE PIECE OF PAPER on which it is written. Nor is a performance standard a "form" to be turned in to some higher authority. The understanding between the supervisor and the employee is written on paper but the paper itself is NOT the standard. In developing standards, the quality and degree of understanding is the important thing not the form of its written expression. The understanding or "standard" describes the level of employee performance which is acceptable to his supervisor. However, this level should be reasonable and attainable.

13. PARTICIPANTS IN ESTABLISHING PERFORMANCE STANDARDS. Standards shall be formalized jointly by the supervisor and the employee on an individual basis. However:

- a. If several employees with like or related jobs report to the same supervisor, they should meet as a group with their supervisor to formalize standards.
- b. Where there are large groups of employees doing the same work, such as electronic maintenance technicians and air traffic controllers, management may feel it to be preferable not to record individual standards for each employee. In this event, standards can be determined centrally. However, representatives of the group should participate in the final statement of standards under which they will be working. A selected group of individuals from the same line of work may meet and formalize "typical" standards or guides in cooperation with key line supervisors. Afterwards, each individual supervisor meets with his employees to discuss each item in the "typical" performance standards to insure understanding and add to them or change them as necessary to meet their own unique requirements. For more specific instructions see orders on performance standards for major occupational groups issued by several services.
- c. The supervisor has final responsibility for the development of performance standards.

14. STEPS IN DEVELOPING STANDARDS.

- a. Identify Unit Goals. The first step that the supervisor should take in establishing standards for his employee's performance is to reach an understanding with his own supervisor. (Performance standards for managerial officials at higher levels are usually expressed in terms of goals or objectives.) They should develop a common understanding of the mission of his unit, the specific objectives he has to achieve, his long and short-term goals, and the standards of performance which he, as supervisor of the unit, is expected to meet. To arrive at this understanding, they can use budget estimates, five-year plans, statements of goals, and current position descriptions. After he and his superior reach an understanding, the supervisor then discusses with members of his staff the objectives and goals of the unit and their responsibilities for the work to be performed. These discussions of unit goals and responsibilities are an important step in promoting understanding of organizational objectives and in gaining acceptance and support of individual goals and responsibilities.

Watch supervisors and other supervisors whose work is specifically and in detail covered in manuals of operation are not so deeply concerned with this step as other supervisors.

- b. Determine Key Result Areas. Key result areas are statements of the major responsibilities of the job, the significant work segments. These major work divisions should not be so broad that they overlap - nor so narrow that they tend to be undesirably detailed. Essentially, they should cover what the employee is hired to do. The list of key result areas for a given position could reasonably range from 4 to 15 items. These items should include all the important duties, responsibilities, and functions of the job, the specific programs, projects, and assignments for which the employee will be responsible and their relative importance. Avoid wherever possible personal traits and characteristics. The discussion to develop standards - or better yet, the series of discussions - may bring forth widely differing opinions on what the basic functions of the job really are. This is to be expected, and it can be rewarding. As the discussion progresses toward agreement on the key result areas, the supervisor may gain new insight into the duties and problems of the employee, and the employee gets a much clearer idea of what the supervisor expects of him.
- c. Determine the Results Expected for Each Key Result Area. After the supervisor and the employee are satisfied with the way they have defined the basic duties, responsibilities, and functions of the job, the RESULT EXPECTED in each key result area can be determined. "Results expected" are statements of the conclusions

reached regarding what the employee must achieve for his performance to be acceptable or satisfactory. Consequently, they should be reasonable and attainable. These results should be stated in such specific and definite terms that both supervisor and employee can afterwards agree when each result has or has not been attained. Whenever possible, the results expected should be stated quantitatively. However, in situations where this cannot be done, it is important that the participants assure that there is a complete understanding between them as to how they will measure accomplishment.

In many areas, the results may be expressed quite specifically in such terms as production output; number of rejects or returns; processing time for claims, requests for service, or requisitions; safety rate; and maintenance schedules. For example, if the supervisor and the employee conclude that the employee is responsible for maintaining the quality of output in his unit (Key Result Area), the results expected should define HOW MUCH quality is expected. Such a specific determination gives the employee a yardstick against which to measure his day-to-day performance and enables his supervisor to recognize whether satisfactory and desired results are achieved. "Results expected" of some administrative management functions may be measured in less specific quantitative terms:

- (1) The extent to which particular programs are to be planned, initiated, or completed.
- (2) Issuance of reports.
- (3) State of public relations (number of requests for services, number of complaints received).
- (4) Extent to which major policies and procedures are in writing and distributed.
- (5) Degree to which authority is delegated and subordinates are developed.
- (6) Extent to which available training courses are planned and utilized or adhere to budget authorizations.

When developing such statements of requirements the "results expected" should be set forth as specifically as possible. This will tend to minimize misunderstanding. Even when they cannot be expressed in terms of how many or how much, focus attention most completely on "results" rather than on "activities."

- d. Acceptance and Understanding. The employee and supervisor should discuss the duties, the responsibilities, and the results expected sufficiently to assure mutual understanding and acceptance of the performance standards. If there are differences of opinion, the supervisor should help the employee to understand why the recommended standard is desirable to gain the employee's cooperation in achieving the results expected.

15. MAINTAINING PERFORMANCE STANDARDS. In paragraph 12 above, a standard is defined as an understanding. Since it is rare that complete understanding is ever achieved between two people, performance standards are also rarely complete. They may need refining and changing as understanding increases. Supervisors are responsible for keeping current the performance standards they established with their employees. Revisions are required:

- a. When there is a change in the assigned duties and responsibilities of a position.
- b. When there is a change in the mission of the work unit, requiring a different level of results expected.
- c. In the normal process of refining understanding of the results expected.

Any revisions should of course be accomplished jointly by the supervisor and the employee

16. STANDARDS FOR EMPLOYEES NEW TO THE JOB. The supervisor should use previously developed standards as a beginning for developing understanding with an employee new to the job. Example:

The supervisor has developed standards with employee A who leaves. Employee B is selected to fill the vacancy. The supervisor may use the standards he previously developed with employee A to help orient employee B to the job. However, the supervisor should not assume that employee B will have the same understanding of - and more important, the same attitude toward - the standards that employee A had. To develop that attitude, employee B must be allowed the same kind of participation in developing standards that employee A had.

- * 17. RECORDING PERFORMANCE STANDARDS. Performance standards can be recorded informally on plain tablet paper as they are identified by the supervisor and the employee. But both the supervisor and the employee should keep a copy of the standards in his own file for future reference purposes. Therefore, after the standards are developed in draft form, they should be recorded on FAA Form 3400-2, Position Performance Standards, which has been developed for this purpose, with one copy for each of the participants.

POSITION PERFORMANCE STANDARDS		DATE
<p>Prepare this form in duplicate. Furnish one copy to the employee; the supervisor will retain the other copy. Attach additional sheets if more space is required.</p> <p>Use of this form will help supervisors and subordinates record position responsibilities and the results which are to be achieved. This information is to be used as a guide when reviewing the performance of an employee in this position and in planning a program for improvement and meeting training and developmental needs. The key result areas recorded below are to be used when completing Part IV of the employee appraisal record, FAA Form 3693 or 3693-1.</p>	POSITION TITLE	
	GRADE	
	POSITION DESCRIPTION NO.	NAME AND LOCATION OF ACTIVITY
	PREPARED/DISCUSSED BETWEEN	
	EMPLOYEES NAME	
SUPERVISOR'S NAME		
KEY STEPS IN PERFORMANCE IMPROVEMENT		
<p>STEP 1 - Determine with the employee the key result areas of the position in terms of short and long range objectives and agree on the results expected.</p> <p>STEP 2 - Periodically review employee's performance with him to determine whether the desired results are being achieved. Jointly develop a plan of action to assist employee improve performance when necessary, and follow through to assure that plans are acted upon.</p> <p>STEP 3 - Discuss with employee any additional or changed responsibilities or expected results, and revise standards to reflect change.</p>		
KEY RESULT AREA NO.	AREAS OF ACTIVITY - RESULTS EXPECTED	
	List each key result area as a major heading. Show results expected under each key result area.	
	<p>KEY RESULT AREAS - The major elements of the position, the important things to be accomplished, the purpose for which the position exists.</p> <p>RESULTS EXPECTED - The results which will be achieved when performance is satisfactory.</p>	

NO.	AREAS OF ACTIVITY - RESULTS EXPECTED (Continued)

CHAPTER 4. CONDUCTING PERFORMANCE REVIEW DISCUSSIONS

18. PURPOSE OF DISCUSSION. The performance review process helps the supervisor and the employee think through and discuss how the employee is doing and gives the employee an opportunity to obtain help in improving his performance. Performance reviews are carried on at all levels of management and for various purposes, such as those mentioned in paragraph 6 above. Usually these reviews emphasize appraising employee performance with view to estimating the employee's worth. These reviews may include some of the techniques advocated here. However, this chapter is concerned solely with the performance review which has as its primary purpose the improvement of employee performance. Some of the objectives of this performance review are to:

- a. Engage the employee in a process of growth - to help him take an important part in the business of building something worthwhile in his job and in his own development.
- b. Assist in resolving differences and conflicts.
- c. Encourage employee to talk over job problems and future plans more broadly than can be done in the ordinary course of work.
- d. Improve communications - Too often ideas are lost or actions misunderstood because the supervisor or the employee fail to communicate effectively. The performance review will do much to improve this communication process by encouraging supervisor and employee to talk about the job.
- e. Permit discussion of performance and performance problems in terms of progress and results rather than in terms of the employee and his personality.
- f. Permit development of a plan of action to improve performance and help the employee develop his capabilities for greater responsibilities.
- g. Provide the data needed for future manpower management and career planning.
- h. Provide a record for evaluating the progress and overall effectiveness of the group.

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19. PROCEDURES. Performance discussions are conducted as frequently as there is a need for a "stock-taking" on work progress, when there are more serious than usual problems, or when there is outright conflict about the job and how it should be done. At any rate there should be a series of developmental discussions to cover the employee's entire job performance at least once a year. While there is no required format for reviewing performance and conducting a performance review discussion, the process can be divided into three parts.

- a. Pre-discussion. Both the supervisor and the employee need to review the performance standards they previously established and analyze accomplishment. They need to consider problems - obstacles to more successful performance - as well as attitude and the overall work situation. The supervisor should keep foremost in mind that this is an attempt to obtain information that will be useful in helping the employee improve his performance. And, in this thinking-through process, the supervisor may gain insight into his own performance.
- b. The Discussion. The performance review process is an evolving one. As such, there is no reason why the employee or the supervisor need to cover the entire job in a single discussion. Rather, the performance review is a series of planned discussions which center around employee performance. Since the objective is primarily to find ways of improving performance, the supervisor will do well to use a problem-solving approach. This takes the supervisor out of the role of judge and makes him a helper. The problem-solving approach has many advantages over one in which the supervisor merely identifies for the employee what is wrong with his performance. It is significant that the problem-solving approach tends to place on the employee the responsibility along with the authority for improving his own performance. This is the whole thrust of the Performance Improvement Program. This is not apt to be achieved if the supervisor does the whole job of evaluating employee performance, identifying problems and their solutions, and informing the employee of what he needs to do to improve.
- c. Post-discussion. As part of this process, the employee and his supervisor need to develop a plan of action for the employee to improve his performance. This plan may provide for development activities ranging from those the employee provides for himself to formal off-the-job training. Whatever the plan, the supervisor must record it, perhaps on the Employee Record Card, OF-4B, and follow up on it to make sure that it is carried out.

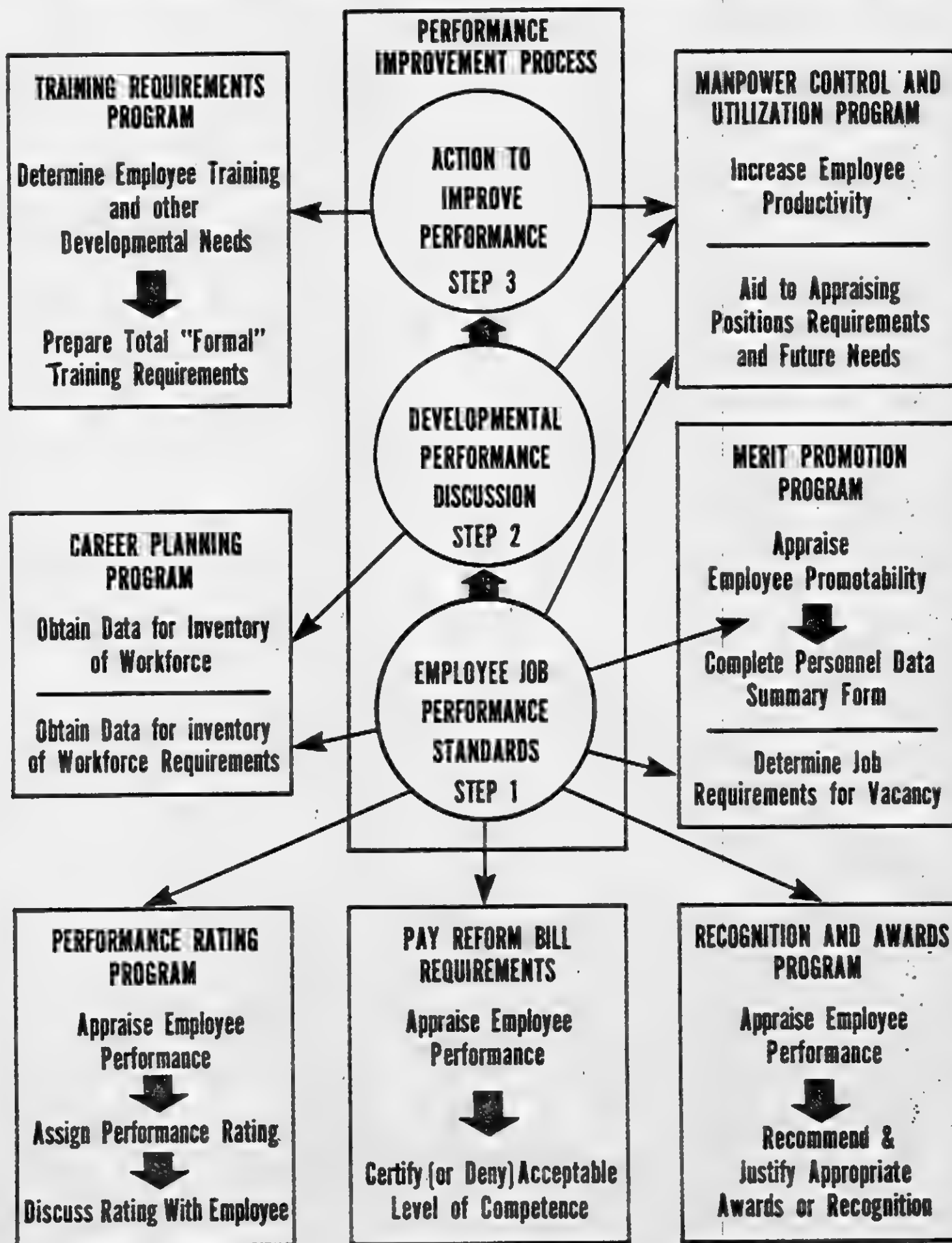
20. SOME CRITICAL CONSIDERATIONS.

- a. The supervisor should keep in mind that most all employees desire to do a good job. If the employee has the capacity to improve

and the supervisor can avoid placing the employee on the defensive about his performance, the employee's performance is most likely to improve.

- b. The attitude of the supervisor is especially important. He needs to recognize that the employee may and often does have insight into the job situation that he, the supervisor, does not have.
- c. It is generally more helpful in a developmental kind of interview to build on the employee's strengths rather than to try to overcome weaknesses.
- d. The supervisor should guard against attempting a posture or approach in the performance review discussion that is foreign to his everyday way of operating. He should be himself.

RELATIONSHIPS OF PERFORMANCE IMPROVEMENT PROCESS To The Manager's Various Personnel Management Responsibilities



APPENDIX 2. STEP-BY-STEP, HOW-TO-DO-IT PROCEDURES FOR
ENTIRE PERFORMANCE IMPROVEMENT PROCESS

1. GETTING STARTED. The procedures for getting started will vary somewhat from supervisor to supervisor. The aim of getting started is to develop a clear understanding of the goals, objectives or the results expected of the unit (facility, section, division, district office, etc.) the supervisor is responsible for. Some examples are:
 - a. The facility chief who has available to him performance standards developed for major occupational groups within his facility should discuss the standards with his supervisor to insure common understanding of them.
 - b. A section chief shall develop understanding with his supervisor regarding what is expected - in terms of specific accomplishment - of his section.
 - c. The head of an Air Carrier District Office shall insure understanding between himself and his supervisor as to what's expected of his district office. This should not be just in terms of what shall be done. Rather, the emphasis should be placed on what should be the results of their work for a given period.
 - d. In facilities in which activities are carefully spelled out in "Manops," the facility chief shall develop with his supervisor a clear understanding of the level of accomplishment expected as well as of what shall be accomplished.
2. DEVELOPING PERFORMANCE STANDARDS. The objective in developing standards is the same, whether they are done on an individual supervisor-employee basis or by the supervisor and a group of employees doing similar work. This objective is to develop an understanding of what is expected of the employee in terms of specific accomplishments.
 - a. Individual supervisor-employee basis. For the most part, performance standards are developed on an individual supervisor-employee basis. For example:
 - (1) A branch chief establishes performance standards with his secretary.
 - (2) A supervisory engineer may establish performance standards with each of the engineers he supervises.
 - (3) An office head may develop performance standards with each of his division chiefs.

- (4) An airplane crew commander may develop performance standards with each member of his crew on an individual basis, particularly if he usually supervises the same crew on each flight.

b. Group basis. In many situations, performance standards can be effectively developed on a group basis. Whenever standards are developed this way, the supervisor needs to insure that each employee covered by the standards participates in developing a common understanding of them. Some examples are:

- (1) A division chief who has several branch heads performing similar work may want to develop a core of common standards with them as a group and then develop appropriate additional standards with each of them on an individual basis.
- (2) A manager who supervises several submanagers, each having employees in the same job family, may want to have standards developed on a group basis. For example, the head of a procurement function may want to have basic common standards developed for all procurement clerks, regardless of the unit in which they work. An effective means for developing such common standards would be through establishing a committee made up of procurement clerks and supervisors. After standards are developed, a supervisor having several procurement clerks in his organization discusses the standards with them to insure complete understanding. Together, they might change them or add to them to meet their specific work situation.
- (3) A Flight Inspection District Office Chief having a number of GS-13 flight inspectors engaged in the same general work, may have his inspectors join him as a group in developing standards for the GS-13 flight inspector in that district office.
- (4) A chief of a Systems Maintenance District Office may want to engage all of the sector chiefs in the district in developing common performance standards for sector chiefs within that district. He may want to modify the standards on an individual basis which he would do jointly with each sector chief.
- (5) An ARTC center watch supervisor, having been furnished performance standards for professional and sub-professional air traffic controllers will want to thoroughly discuss the standards provided with those for whose performance he is responsible to insure understanding and then add to them what is necessary to cover their local job situation.
- (6) An Airport District Office Chief may want to develop common standards with the engineers in his office for this position.

- c. How to develop standards. As means to organize the thinking of the employee and supervisor in developing a common understanding, performance standards are generally developed in three steps:
- (1) Identify KEY RESULT AREAS - These are the "big chunks" of the employee's job. For a secretary these chunks might be (a) taking and transcribing dictation, (b) answering the telephone and greeting visitors, and (c) filing. Most supervisory jobs will have "supervision" as one of the KEY RESULT AREAS.
 - (2) Determining RESULTS EXPECTED - To achieve a common understanding, the participants discuss thoroughly what is expected of the employee when he is performing at an acceptable or satisfactory level. For example, a cook in FAA's dining room on Wake Island may have as a RESULT EXPECTED: "Most employees eating in the FAA dining room seem reasonably satisfied with the quality of the preparation of the food as demonstrated by their comments of approval and relatively few serious complaints." The cook and his supervisor need to consider carefully what they mean by statements, such as "relatively few" and "serious complaints."
 - (3) Recording the UNDERSTANDING - The common understanding of the KEY RESULT AREAS AND RESULTS EXPECTED of the employee's job are the performance standards. As they develop the standards, (or modify those developed for certain major occupational groups) the supervisor and the employee need to record their understanding. Doing this will help them further sharpen their thinking and will help insure that the standards can be reviewed later from time to time. The standards should be recorded in such a way that there will be a minimum of misunderstanding when they are used later. Each employee and his supervisor should have his own copy of the standards they developed together.

3. PREPARING FOR THE DISCUSSION.

- a. Review job performance. The performance discussion is to be a two-way interchange between the supervisor and the employee. Therefore, it is important that both review the employee's job performance. The supervisor should ask the employee to think through his performance. The employee might ask himself such questions as:
- (1) How well has he performed as compared with the RESULTS EXPECTED on the job?
 - (2) How satisfactory are the standards themselves? That is, are they realistic? Are they complete? Is there any area of job performance that is not clear?
 - (3) What problems does he see on the job? What keeps him from performing at a higher level?

The supervisor also reviews the employee's performance and the total job situation in much the same way. In addition, the supervisor should examine his feelings about the employee and the work situation. This will help him become more objective during the discussion. Particularly, the supervisor needs to know what if anything influences his reaction to the employee other than his actual performance.

- b. Set the Time and Place. The performance review discussion described here refers to a thorough consideration of the overall job. This kind of discussion is different from the every day "talks" that a supervisor has with an employee about his performance on a specific assignment or about his day-to-day achievement. The performance review discussion requires putting aside day-to-day matters. The whole job performance over a longer period of time is studied. Therefore, it is important that the supervisor set a time and place for the discussion in which both he and the employee will be free from outside disturbances. It is good not to assign the "dregs of the day" to this important discussion. It should occur when both can discuss the job objectively. The supervisor should notify the employee in advance of the discussion. Together they should arrive at a mutually acceptable time. Most supervisors will find that an optimum amount of time for discussion is one hour. Less than this will tend to force them to compress their ideas and perhaps cut off productive thought. On the other hand, allowing too long a period will tend to encourage "rehashing" ideas. Keep in mind that it's not necessary to cover the entire job in one sitting.
- c. Plan the Discussion. A discussion, or series of discussions, to cover the entire job needs to take place at least once each year. However, such discussions may be called for more frequently. The situation determines how the supervisor should plan the discussion. Here are some situations:
- (1) The supervisor wants to cover the total job as part of an annual or semi-annual "stock-taking." He may then plan the first hour for a general review of the job. In this session the supervisor and the employee may identify problems or matters which require more attention. They then plan additional sessions to follow-up on these items.
 - (2) The supervisor (or the employee) believe a discussion is required to talk about some apparent problem on the job. Or the supervisor may notice a marked change in the employee's performance. The discussion to take care of these situations may need to be more "structured." That is, the supervisor may want to bring up matters prompting the discussion right at the beginning of it. They can then devote the entire meeting to the matter. But in the discussion they can look at the matter as part of the overall job conditions.

- (3) Whatever the situation, the supervisor needs to jot down mentally or on paper the points he wants to have covered in the discussion. The supervisor need not bring up these points himself. They can "come up" in the course of the discussion and may be raised by the employee.

4. CONDUCTING THE DISCUSSION.

- a. The Supervisor's Approach. The primary objective of the performance review is to help the employee improve his performance. Therefore, the approach that the supervisor uses is critical. It determines whether the employee will improve his performance through a genuine desire to do so, change merely because the supervisor told him to, or make no changes in his performance at all.

Supervisors are encouraged to use the second of the following two general approaches to the performance discussion.

- (1) The supervisor sets himself up as the "judge". In this approach he judges whether the employee is performing at the level expected. He tells the employee his judgment and points out specific areas requiring improvement. In addition, he indicates to the employee what he needs to do to bring about this improvement. In the process of telling the employee, he may indeed listen to the employee's side of the picture. But it is the supervisor's judgment that really counts.
 - (2) The supervisor acts as the "helper." In this approach he does not assume that he has all the facts regarding the employee's performance. Nor does he believe he knows all the problems or obstacles confronting the employee on the job. He is the "helper." He helps the employee think through his own performance and identify what keeps him from performing at a higher level. Together they pin-down problems. The supervisor adopts a "problem-solving" attitude. The overall problem is: "What can be done by the employee, by the supervisor himself, or by both to improve the work situation or to provide the employee the training or experience he needs to improve?" Together, they attempt to solve the problem.
- b. Attitude of the Supervisor. The effectiveness of the interview depends up on the attitude and skills of the supervisor. In order to use the "problem-solving approach" the supervisor must really believe that the employee is most likely to improve his performance when there is mutual respect. A successful performance discussion depends upon it. The supervisor can best generate respect when he demonstrates it by his actions in the discussion. Further, he needs to believe that change is a necessary part of the work situation. He and the employee need to participate in the change together to insure the healthy growth of both. Therefore, above all else, the supervisor

needs to avoid, during the discussion, any action or statement that will make the employee feel he has to defend his behavior. The developmental performance discussion described here is not the place for disciplining the employee. He is not to be criticized for his shortcomings. When they are identified, they are viewed as developmental needs, not as sins.

- c. Suggestions for Starting the Interview. For most employees, the most effective approach for the supervisor to use in the performance discussion is the "helper" or problem-solving approach. To get underway with the problem-solving discussion, the supervisor should:

- (1) Make the purpose of the discussion clear to the employee from the start.
- (2) Encourage employee participation in the discussion with broad, general questions trying to get the employee to express his feelings about the job. Some examples of such questions are:
 - (a) What gives you the greatest satisfaction on the job?
 - (b) What causes the greatest dissatisfaction?
 - (c) How do you feel things are going in our "shop?"
 - (d) What do you feel are our biggest problems?
 - (e) What do you feel have been our greatest achievements since we had our last discussion like this?
 - (f) What are some of the things that we ought to change in our overall work situation?

- d. Conducting the Interview. The supervisor shall follow-up on any leads the employee provides to insure a thorough discussion as well as to insure that the employee has really expressed what's on his mind. Some suggestions for accomplishing this are:

- (1) Record the employee's ideas on paper particularly if there are a number of them. This will let him know that you are seriously considering what he is saying and that a record is kept for referral to specific items later on.
- (2) Listen effectively. Don't be afraid of silence. Encourage the employee to complete his ideas. Don't put words in his mouth. If he has trouble developing an idea, restate it for him. This will help insure that the supervisor does understand what the employee has said and will encourage him to clarify or further explain it.

- (3) Use questions in such a way that they indicate the supervisor wants to get the complete story rather than to put the employee on the spot.
 - (4) Summarize frequently to show what ground has been covered and to indicate what might still be discussed.
 - (5) Discuss performance and performance problems in terms of results expected. But don't use the performance standards previously developed just as a check list for the discussion.
 - (6) As much as possible, confine the discussion to a consideration of the employee's job and total work situation rather than of the employee and his personal qualities.
 - (7) Encourage the employee to identify and discuss obstacles to performance - what is it that keeps him from performing at a higher level.
 - (8) Don't attempt to force the employee to conclusions that you have previously arrived at. Keep an "open" attitude.
- e. Some time before the discussion, determine with the employee whether his performance standards are adequate. Do they need to be changed, clarified or added to? Are additional standards necessary? Should some be dropped?

5. IDENTIFYING EMPLOYEE TRAINING AND DEVELOPMENTAL NEEDS.

The employee may have little power to do much about some of the problems on the job and obstacles which keep him from performing at a higher level. Other obstacles he can help remove. Some of these have to do with his training and developmental needs. He may lack skills in certain areas and be "rusty" in others. Some of his developmental needs may have to do with his feeling toward his job and perhaps even with his confidence in being able to handle certain parts of the job. Obstacles of this kind, which may be identified during an effective performance discussion, are illustrated below.

a. Obstacles.

- (1) Lack of proper and complete instruction in using equipment new to employee.
- (2) Lack of skills in handling a new procedure.
- (3) Lack of understanding of the overall aims of the organizational unit.

- (4) Lack of appreciation for the relative importance of various parts of his job.
- (5) Lack of ability to handle his supervisor's work when it is assigned to the employee during the supervisor's absence.
- (6) Lack of incentive to do the job more effectively.
- (7) Unwillingness or inability to delegate to his own subordinates.
- (8) Misunderstanding of how the mission and functions of his organizational unit relate to other parts of the Agency.
- (9) Inability to act on his own initiative.

b. Means to overcome obstacles. The next part of this step is to determine what training and developmental activities the employee needs to overcome these obstacles. Some of these needs can be met through providing him different or new work experiences. Others can be met through training. Still others can be accomplished through the employee's own self-development efforts.

- (1) Providing work experiences. - The supervisor can provide the employee new or different work experiences by:
 - (a) Delegating him authority to accomplish work assignments with less direct supervision.
 - (b) Coaching the employee to be an "understudy" to let him learn the supervisor's job.
 - (c) Officially detailing the employee to another job area.
 - (d) Rotating the employee into a series of different jobs.
 - (e) Developing a "training agreement" whereby the employee can be given duties not included in his job description and for which he may not have qualifying experience.

Items (a) and (b) and to some extent (d) can be accomplished by the supervisor without any official personnel action document. Items (c) and (d) must be done only in full coordination with the personnel office. Item (e) can be arranged only through the personnel office.

- (2) Kinds of training opportunities. - Training is a second means of providing the employee help to improve his performance by overcoming obstacles. Five kinds of training are available:

- (a) On-the-job - The supervisor, or someone he appoints, does this training at the employee's work place.
- (b) Formal "Field" Group Training - This is provided by training officials either within the facility or at some central field location.
- (c) FAA Academy Courses - A wide variety of technical courses and some non-technical courses are provided.
- (d) Directed Study - The FAA Academy also conducts a "Correspondence Course" Program. In these courses the employee receives his training through correspondence with an instructor at the Academy.
- (e) Out-of-Agency Training - When any of the above training opportunities do not meet the employee's training needs or when it is impractical or inconvenient for the employee to participate in them, the supervisor may arrange for training in some other Agency, in private industry, or in a technical or academic school or college.

On-the-job training can, of course, be arranged for or conducted by the supervisor himself. Technical training officers and the training officers of each personnel and training location (e.g. regions, NAFEC, etc.) can give the supervisor advice on other kinds of training and how to apply for it.

- (3) Employee Self-development. - A third way to provide the employee the help he needs to improve his performance is through counseling him on self-development activities. These include:
 - (a) Attendance at a technical, secretarial or other school or college at his own expense and on his own time.
 - (b) Reading carefully prescribed materials to add to the employee's knowledge in certain specific areas.
 - (c) Participation in volunteer or paid work on a part-time, off-the-job basis to develop needed experience or skills.

- 6. CLOSING THE DISCUSSION. The supervisor should not end the discussion. He merely "adjourns the meeting." Performance discussions are a part of a never-ending process. However, as a means to bring an immediate performance discussion to a close, the supervisor might:

- (a) On-the-job - The supervisor, or someone he appoints, does this training at the employee's work place.
- (b) Formal "Field" Group Training - This is provided by training officials either within the facility or at some central field location.
- (c) FAA Academy Courses - A wide variety of technical courses and some non-technical courses are provided.
- (d) Directed Study - The FAA Academy also conducts a "Correspondence Course" Program. In these courses the employee receives his training through correspondence with an instructor at the Academy.
- (e) Out-of-Agency Training - When any of the above training opportunities do not meet the employee's training needs or when it is impractical or inconvenient for the employee to participate in them, the supervisor may arrange for training in some other Agency, in private industry, or in a technical or academic school or college.

On-the-job training can, of course, be arranged for or conducted by the supervisor himself. Technical training officers and the training officers of each personnel and training location (e.g. regions, NAFEC, etc.) can give the supervisor advice on other kinds of training and how to apply for it.

- (3) Employee Self-development. - A third way to provide the employee the help he needs to improve his performance is through counseling him on self-development activities. These include:
 - (a) Attendance at a technical, secretarial or other school or college at his own expense and on his own time.
 - (b) Reading carefully prescribed materials to add to the employee's knowledge in certain specific areas.
 - (c) Participation in volunteer or paid work on a part-time, off-the-job basis to develop needed experience or skills.

- 6. CLOSING THE DISCUSSION. The supervisor should not end the discussion. He merely "adjourns the meeting." Performance discussions are a part of a never-ending process. However, as a means to bring an immediate performance discussion to a close, the supervisor might:

- a. Summarize quickly the points covered, that is, list the problems and obstacles to better performance they identified together.
- b. State what conclusions were reached, that is, what they are going to do about the obstacles, what changes they need to make in the work situation, etc.
- c. List the action that both the employee and the supervisor are going to take to follow-up on the conclusions. For example, identify what training the employee shall take and what he'll do on his own to increase his skills.

P

7. FOLLOW-UP.

It is important that the supervisor follow-up on the development plans and action to eliminate obstacles and otherwise change the work situation that the supervisor and the employee discussed. An effective performance discussion in which problems and obstacles and developmental needs are thoroughly discussed but then dropped after the discussion can do much to dampen the positive feeling an employee may have about the entire process. Therefore, it is important that the supervisor immediately take the action they both agreed on. He needs to make changes in the work situation. He needs also to arrange for appropriate training or other developmental experience immediately and to inform the employee as soon as possible of arrangements.

8. USING PERFORMANCE IMPROVEMENT PROCESS FOR OTHER PURPOSES.

Reserved.

ORDER

FEDERAL AVIATION AGENCY
WASHINGTON, D. C.

file
3410.1

6/28/65

SUBJ: CAREER PLANNING PROGRAM

1. PURPOSE. This order establishes policy and assigns responsibilities for career planning in the Federal Aviation Agency.
2. CANCELLATION. Agency Order OA 3410.1 dated 8/1/63, Subject: "FAA Career Planning Program."
3. POLICY. It is the policy of the Federal Aviation Agency to develop and utilize the talents of all employees to the optimum extent compatible with Agency requirements and individual employee interests. Career planning is the systematic process through which this goal shall be obtained.
4. CAREER PLANNING ELEMENTS. In the Federal Aviation Agency the career planning process shall consist of the following elements:
 - a. Performance Improvement Program as defined in Agency Handbook PT P 3400.2 dated 11/17/64, Subject: "Employee Performance Improvement." Under this program, supervisors are required to establish written performance standards with their employees and to conduct meaningful performance discussions. The process established under this program is designed to increase an employee's effectiveness and efficiency, and develop the work climate and environment necessary for career planning.
 - b. Career Inventory refers to determining present and future work force requirements in terms of: How many employees are needed; in what occupations or categories are they needed; and, what specific knowledges and skills are required. It refers also to taking stock of the current abilities and potential capabilities of the work force and identifying career progression patterns.
 - c. Career Coordination consists of analyzing the data obtained through the Performance Improvement Program and the career inventory process, applying the results of the analyses to help make sound decisions about the work force, and identifying areas where changes are needed in the Agency Personnel Management and Training Program.

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- d. Systems Improvement refers to the development of needed methods, techniques, and procedures or tools to implement the changes or decisions resulting from accomplishment of the career coordination aspect of career planning.

The plan prescribed by management which results from the effective application of all of the above elements is called a CAREER SYSTEM. A comprehensive system includes:

- a. Management's analyses of current and future work force requirements.
- b. Management's plans for better utilization and development of employee skills and potential to meet present and future manpower needs.
- c. Career data necessary for an employee to determine his career objectives and to guide his self-development effort.

The establishment of Career Systems will furnish the vehicle which will enable management and the work force to attain the objectives of the Agency Career Planning Program.

5. RESPONSIBILITIES.

a. The Deputy Administrator shall:

- (1) Provide necessary direction to assure development and operation of needed Career Systems within those organizations reporting directly to the Administrator. These include such organizations as the Bureau of National Capital Airports and the Office of the Deputy Administrator for Supersonic Transport Development.
- (2) Designate organizations in the above group who shall develop Career Systems.

b. The Associate Administrators shall:

- (1) Provide necessary leadership and direction to assure development and operation of Career Systems within their respective organizations.
- (2) Designate those organizations under their jurisdiction who shall develop Career Systems.

c. Heads of Washington Offices and Services shall:

- (1) Develop, establish, and administer organizational Career Systems as directed by the Deputy Administrator or the appropriate Associate Administrator.
- (2) Obtain appropriate regional and center participation and representation in the development of Career Systems.

- (3) Develop policies, instructions and guidance on organizational Career Systems.
 - (4) Assure programs developed adhere to policies and guidance provided in this Order and subsequent publications.
- d. Regional Directors and Managers of NAFEC, Aeronautical Center, and Headquarters Operations shall:
- (1) Participate in the development of Career Systems as requested by Washington Offices and Services.
 - (2) Implement Career Systems as established.
 - (3) Develop and establish local Career Systems in those areas where a need exists and where Systems have not been developed or are not planned for development on an Agency-wide basis.
 - (4) Provide necessary staff assistance and guidance and continuously publicize career planning activities to assure maximum understanding of and participation in the programs by supervisors and employees.
- e. The Assistant Administrator for Personnel and Training shall:
- (1) Develop basic policy guidance, procedures and other program requirements for career planning activities in the Agency.
 - (2) Review and approve for publication, procedures, instructions, and guidance on Career Systems which have Agency-wide application.
 - (3) Provide advice and assistance to organizations developing and establishing Career Systems.
 - (4) Provide staff supervision and coordination of all Agency career planning activities, including the integration of organizational Career Systems into the total Agency Career System.
 - (5) Evaluate the effectiveness of career planning activities through periodic surveys, review of reports and other data.
 - (6) Under the direction of the Executive Personnel Board, develop and establish an Agency Executive Career System.


N. E. Halaby
Administrator

ORDER

FEDERAL AVIATION AGENCY
WASHINGTON, D. C.

3430.1

11/24/65

SUBJ: EMPLOYEE PERFORMANCE RATING

1. PURPOSE. This order transmits the Agency Handbook on Employee Performance Rating.
2. CANCELLATION. Agency Order PT 3430.1 (formerly Agency Practice 3-430 Performance Rating).
3. REFERENCES.
 - a. Chapter 430 Federal Personnel Manual, Performance Evaluation.
 - b. Part 430 Federal Personnel Manual Supplement 990-1.
 - c. Agency Handbook PT P 3400.2, Employee Performance Improvement.
 - d. Agency Handbook PT P3330.1A, Merit Promotion Program Chapter 5, Section 500.
 - e. Agency Handbook PT P 3450.2A, Recognition and Awards Program.
 - f. Agency Order PT 3550.7, Acceptable Level of Competence.
 - g. Agency Order OA 3750.1, Conduct and Discipline.
 - h. Agency Handbook PT P 3750.1A, Conduct and Discipline.
 - i. Agency Handbook PT P 3300.7, Employment.
 - j. Agency Order PT 3350.2, Reduction in Force.

APPROVED NOVEMBER 24, 1965



Distribution: WRCN-5; M-3; FOF (1-5)

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11/24/65

CHAPTER 1. GENERAL PROVISIONS

1. PURPOSE OF HANDBOOK. This handbook provides FAA supervisors with guidelines for rating employees in accordance with the Performance Rating Act of 1950.
2. EMPLOYEES COVERED. Performance ratings must be assigned to all paid Agency employees, except Presidential appointees, probationary or trial period employees, foreign nationals paid in accordance with their local prevailing wage rates, and employees paid on a fee basis.
3. REQUIREMENTS AND PROVISIONS. The Performance Rating Act of 1950 requires each supervisor to evaluate the performance of those he supervises, arrive at and assign adjective ratings, and discuss those ratings with the employees.
 - a. Civil Service Commission Requirements. The Civil Service Commission instructions state that performance evaluations and official performance ratings should be used for all or some of the following:
 - (1) To help improve individual performance.
 - (2) To strengthen supervisor-employee relationships.
 - (3) To recognize employee accomplishments and good work.
 - (4) To guide personnel actions, such as pay increases, promotion, demotion, removal, reduction-in-force.
 - (5) To identify job requirements and standards and keep employees and supervisors aware of them.
 - (6) To make and keep employees aware of their supervisors' judgments on their work performance.
 - (7) To identify training needs.
 - b. Agency Provisions. The Federal Aviation Agency provides two tools to accomplish the above objectives: Performance ratings, required by the Performance Rating Act of 1950, and the Agency's Performance Improvement Program.
 - (1) The Performance Improvement Program is primarily a development process which is used throughout the Agency to:
 - (a) Strengthen supervisor-employee relationships through increased understanding and communication between them about the job.

- (b) Help the supervisor and the employee jointly develop job performance standards and job requirements.
 - (c) Help the employee improve his performance through identifying his training and other self-development needs and the Agency-sponsored developmental experience he requires.
- (2) Performance Rating is primarily an appraisal process which is useful to:
- (a) Guide personnel actions, such as promotions, demotions, removals, and reductions-in-force.
 - (b) Officially and appropriately recognize the employee who, in his supervisor's judgment, has performed either outstandingly or below the satisfactory level.

4. RATINGS ASSIGNED. An employee is assigned an annual performance rating of:

- a. Satisfactory when his performance meets or exceeds the overall requirements of his position. This rating is also automatically assigned to each employee when he enters on duty in the Agency and when he changes to a different position through reassignment, promotion, or demotion.
- b. Unsatisfactory when his performance clearly falls short of the minimum requirements of his position.
- c. Outstanding when his performance clearly and specifically exceeds the performance requirements in all aspects and to the point where special commendation is warranted.

CHAPTER 2. THE RATING PROCESS

5. PARTICIPANTS.

- a. The employee is assigned a rating that reflects his performance over a given period. His rating is based on performance standards established in accordance with Chapter 3 of FAA Handbook PT P 3400.2, Employee Performance Improvement.
- b. The rating official is the employee's immediate supervisor. He discusses the employee's performance with him, assigns the employee a proper performance rating, and promptly notifies him of his rating. Discussing the employee's performance with him is mandatory.
- c. The reviewing official is the supervisor next in line of authority above the rating official. For the purposes of this handbook, a deputy or assistant may be considered a supervisor in line of authority. He reviews unsatisfactory and outstanding performance ratings proposed by the rating official and recommends that they be either approved or denied.
- d. The approving official approves or disapproves unsatisfactory and outstanding ratings submitted by the reviewing official. He must be at least one supervisory level above the reviewing official, except when a rating is assigned or reviewed by the Administrator.
 - (1) The Administrator is the approving official for all persons whose ratings are assigned or reviewed by him or his immediate subordinates.
 - (2) The Associate Administrators are the approving officials for persons whose rating are reviewed by their immediate subordinates.
 - (3) Office and Service Heads, Regional Directors, the Director of the Aeronautical Center, and the Director of NAFEC are the approving officials for persons whose ratings are reviewed by supervisors at any level within their respective jurisdictions. They may redelegate their authority down to the next supervisory level above the reviewing official. However, regional directors may not redelegate their approval authority below the facility chief level.

6. PERIOD COVERED. The period of service covered by a performance rating is that period (usually one year) which occurs between performance ratings. Each performance rating remains in effect until a new one is assigned.
7. RATING DATE. The employee's rating date is that date on which he is assigned an annual performance rating. That date must occur not earlier than 60 days nor later than 10 days before the anniversary date of the employee's appointment or last regular pay action (whichever was more recent), except in the event of a rating postponement.

NOTE: If an employee is performing unsatisfactorily, it is not necessary nor desirable to wait until his regular rating date to assign an unsatisfactory performance rating. Any time an employee's performance is below the minimum requirement of his position, the supervisor is responsible for taking immediate and appropriate corrective action in consultation with higher management and the personnel office. He should initiate remedial action as required without reference to regular appraisal periods.

8. RATING POSTPONEMENT. This is a documented postponement of a performance rating. When an employee's rating is to be postponed, the rating official must promptly notify the employee in writing, giving the reason(s) for the postponement and the date on which the postponed rating is to be given. Ratings are postponed for any of the following reasons:
- An employee's service in his current job has been interrupted by an off-the-job training assignment in excess of three months. The rating must be postponed until three months of service is completed following resumption of his regular duties.
 - An employee's period of service in his current job is less than three months. The rating must be postponed until three months of service is completed.
 - A warning of unsatisfactory performance has been issued and the 90 day period has not been completed. The rating must be postponed until the 90 day period is completed. (Whenever an adverse action, such as discharge, suspension, or reduction in rank or compensation for reasons other than reduction-in-force, is proposed or pending, the regular rating date is postponed until the adverse action is completed).
 - A change occurs in the supervisory relationship. The supervisor may postpone the regular rating date of an eligible employee whom he has supervised less than three months.

The postponement of a rating will ordinarily be for not more than three months.

9. 90-DAY WRITTEN NOTICE OF UNSATISFACTORY PERFORMANCE. An employee may be rated unsatisfactory only after he has been issued a 90-day prior warning and given a reasonable opportunity to demonstrate satisfactory performance. Such a warning should be issued only with the intent of bringing an employee's unsatisfactory performance up to a satisfactory level. If all reasonable efforts to improve the employee's performance have already been taken and have failed, and it is felt that the required improvement cannot be accomplished in the 90-day warning period, removal action should be promptly initiated in accordance with the handbook on Conduct and Discipline, PT P 3750.1A. Removal action through the performance rating process should not be initiated. However, if it is felt that the issuance of the notice would be instrumental in helping the employee improve his performance, the rating official should use this procedure. In using it, the following requirements must be observed.

- a. Preparing the Notice. Before an unsatisfactory rating is assigned, the rating official **MUST** give the employee a written warning not less than 90 days not more than 180 days prior to the date when the rating is to be assigned; and he **MUST** give the employee a reasonable opportunity to demonstrate satisfactory performance. The warning notice shall state:

- (1) Which performance standards or other job requirements the employee is failing to meet satisfactorily, the level of performance required, and how his performance fails to meet the level required.
- (2) What the employee must do to bring his performance up to a satisfactory level within the warning period.
- (3) What efforts will be made by the rating official to help the employee improve.
- (4) That the employee will receive, at the end of 90 days, an unsatisfactory rating if his performance does not improve to meet established requirements.

- b. Issuing the Notice. The 90 day notice, when signed by the rating official and concurred by the review authority, shall be referred to the personnel office serving his organizational jurisdiction (e.g. Region) for review as to procedural adequacy before delivery to the employee. When delivered, the receipted copy showing the employee's signature and date received will be forwarded to his personnel office for filing in the employee's official personnel folder. A copy of the warning notice must be given to and discussed with the employee by the rating official.

- c. Postponing the Rating. If the warning notice is not delivered to the employee at least 90 days before the employee's regular rating date, the employee shall also be notified in writing of a rating postponement.

NOTE: The rating official may wish to consult his personnel office before issuing an unsatisfactory rating.

CHAPTER 3. JUSTIFICATIONS, RECORD, AND REPORTS REQUIRED

10. NO JUSTIFICATION FOR RATING OF SATISFACTORY. No written justification is required when a rating of satisfactory is assigned. Neither does such a rating require the approval of higher authority. However, the rating official should discuss with the reviewing official an intent to assign a satisfactory rating.
11. WRITTEN JUSTIFICATION FOR UNSATISFACTORY RATING.
 - a. Preparing the Justification. At the end of the 90 day warning period, if the rating official determines that the employee's performance has remained below the minimum requirement, the rating official shall prepare a written justification for an unsatisfactory rating. The justification shall state in detail the reasons for an unsatisfactory rating, the facts of the prior warning, and the efforts made by the rating official to help the employee improve during the warning period. In addition, the justification should contain the rating official's recommendation concerning reassignment, demotion, or separation of the employee.
 - b. Forwarding Justification. The rating official forwards a copy of the justification and any supporting material to the reviewing official. The reviewing official forwards the justification and any additional comments to the approving official. The unsatisfactory performance rating becomes official when the written justification has been approved by the approving official. If the approving official does not approve, the rating for the period covered will automatically be satisfactory and will be so recorded.
 - c. Notifying the Employee. The rating official shall provide the employee with a copy of the justification for unsatisfactory rating. When the unsatisfactory rating has been approved or disapproved, the rating official must promptly notify the employee and inform him, in writing, of his rights of administrative review and formal appeal.
 - d. Results of Unsatisfactory Rating. When an unsatisfactory rating is approved, the rating official must take action to reassign, demote, or remove the employee. However, a notice and a decision of adverse action must be based on specifically described deficiencies and not just on the unsatisfactory rating. Adverse action procedures are contained in Agency Handbook PT P 3750.1A, Conduct and Discipline.

12. WRITTEN JUSTIFICATION OF OUTSTANDING RATING.

- a. Preparing the Justification. The rating official shall prepare a written justification for a proposed outstanding rating. The justification must describe clearly and specifically how the employee has exceeded the performance requirements in ALL aspects of the position to the point where special commendation is warranted. The justification must be based on the established performance standards for the employee's job.
- b. Forwarding Justification. The original and one copy of the rating proposal are signed and dated by the rating official and forwarded to the reviewing official. If the reviewing official concurs, both copies of the proposal are signed, dated, and forwarded to the approving official. If the reviewing official doesn't concur, the reasons are stated and forwarded with the proposal to the approving official. If the approving official approves the rating proposal, he signs and dates both copies and the rating becomes official. If the approving official does not approve the proposed action, the rating for the period covered will automatically be satisfactory and will be so recorded.
- c. Notifying the Employee. If the outstanding rating is approved, the original copy of the justification is returned to the rating official for presentation to the employee. The second signed copy is sent to the personnel office for filing in the employee's official personnel folder. The employee is also notified if the rating is not approved.

13. RECORDS AND REPORTS. A copy of the justification of the employee's performance rating shall be kept in his official personnel folder. A quarterly count of the number of unsatisfactory and outstanding ratings will be reported regularly in the Office of Personnel and Training Progress Report by the personnel officer of each PT location.

NOTE: Beginning in February, 1966, performance ratings will be recorded on a consolidated appraisal form for each employee. The form will be provided for the rating official well in advance of the employee's rating date.

CHAPTER 4. REVIEW AND APPEAL PROCEDURES

14. GENERAL. The employee is encouraged to discuss a rating about which he has questions, with the rating official and, if he wishes, with the reviewing official. If after the discussion(s) the employee does not agree with the rater and reviewer in the evaluation of his performance, he may request an administrative review or initiate a formal appeal action.

- a. An employee rated satisfactory may obtain an administrative review or he may initiate a formal appeal action, but he may not do both.
- b. An employee rated unsatisfactory may obtain one administrative review, he may initiate a formal appeal, or he may initiate a formal appeal after the administrative review.

The rating official must inform the employee of his rights of administrative review and formal appeal, during the rating discussion.

15. THE ADMINISTRATIVE REVIEW shall be accomplished on an individual basis by a Committee for Impartial Review. The committee shall be appointed on an ad hoc basis and convened by the appropriate personnel office, under the direction of the head of the employing jurisdiction.

- a. Committee Members. The Committee for Impartial Review will consist of a chairman and two members. To assure complete impartiality, the chairman and members will be selected from outside the immediate organizational unit in which the employee is assigned.
- b. Effect of Committee. The committee will review the case and within 30 days submit a report of findings to the head of the region, office, service, NAFEC, or the Aeronautical Center who will render a written decision to the employee within 5 days of the findings or as soon thereafter as circumstances permit.

16. THE FORMAL APPEAL shall be heard by a Performance Rating Board of Review established in coordination with the United States Civil Service Commission. The board of review shall be established on an ad hoc basis by the directors of each of the regions, the Aeronautical Center, and NAFEC, for all personnel assigned within each respective area of jurisdiction except for those persons whose ratings are made, reviewed, or approved at the Washington level. Regional directors may delegate to area managers the authority to establish boards of review.

The Manager of Headquarters Operations shall establish a Performance Rating Board of Review for all personnel serviced by Washington headquarters and for those field employees whose ratings are made, reviewed, or approved at the Washington level.

- a. Board Members. Each board shall consist of three principal members. Each principal member shall have one or more alternates to serve when the principal member cannot. Members and alternates are designated as follows:
 - (1) The Chairman and alternate chairman are designated by the Civil Service Commission.
 - (2) The Agency Member and his alternates are designated by the establishing official.
 - (3) The Employee Member and his alternates are designated by the appellant at the time of his appeal. The Employee Member and his alternates shall be FAA employees who are employed within the same area of jurisdiction as the appellant and are in no way directly or indirectly controlled or supervised by the appellant. Neither the Employee Member nor his alternates may be related to the appellant by blood or marriage.
 - b. Quorum. All members of the Performance Rating Board of Review must be present at all times during hearings and must participate in deciding appeals. An alternate may act for his principal, provided the members reaching a decision on a case developed by a hearing are the same members that conducted the hearing.
 - c. Employee Representative. Each employee is entitled to select a representative to assist him in the preparation of an appeal and in the presentation of oral or written information before a Performance Rating Board of Review. An employee who exercises his right to choose a representative must submit a signed statement to the Performance Rating Board of Review identifying his representative by name and title.
 - d. Effect of Board. The Board either: (1) increases the performance rating or (2) sustains the assigned rating without change. If the board increases the rating, the official records of the employee are changed to reflect the board's decision. The increased rating must be substituted for the original rating in all places where the original rating is recorded in official records. Appropriate Agency officials must reconsider any administrative action based on the original performance rating and, insofar as possible under law and regulations in the Agency interest, redetermine and adjust those administrative actions to conform to the increased rating.
17. THE REQUEST FOR ADMINISTRATIVE REVIEW must be filed with the employee's personnel office within 10 days after the employee receives his official notice of rating unless good and substantial reasons justify an extension of this limit.

18. THE INITIATION OF FORMAL APPEAL ACTION is made by filing a written statement in quadruplicate to the Chairman of the Performance Rating Board of Review. Optional Form 6 (see Appendix 1) is provided for the purpose, but is not mandatory.
- a. All Communications to Boards of Review located in Washington, D. C., Metropolitan Area should be addressed: Performance Rating Board of Review, c/o United States Civil Service Commission, Washington, D. C. 20415. Communications to boards of review located outside the Washington, D. C., Metropolitan Area should be addressed: Performance Rating Board of Review, c/o the Civil Service Region having jurisdiction over the place where the board of review is located.
- b. Time Limits on Appeals. Each appeal to a Performance Rating Board of Review must be made in writing to the chairman within the following time limits:
- (1) Thirty (30) days after the employee receives notice of his performance rating; or
 - (2) Ten (10) days after the employee withdraws his request for an administrative review, if more than thirty (30) days have elapsed since he received notice of his rating; or
 - (3) Thirty (30) days after the employee receives a decision on an administrative review of an unsatisfactory rating.

Boards of review may waive the above time limits for good reasons, such as circumstances beyond the employee's control prevented him from appealing within the specified period or necessary information was unavailable during that period.

CHAPTER 5. RESPONSIBILITIES

19. OVERALL PROGRAM RESPONSIBILITIES.

- a. The Deputy Administrator is responsible for conducting the program for the offices that report directly to the Office of the Administrator. The Deputy Administrator shall:
 - (1) Keep employees and supervisors informed, through training or other appropriate means, as to how performance rating activities are to be carried out.
 - (2) Establish, as necessary, appropriate policies and procedures consistent with the program objectives as outlined in this handbook.
 - (3) Periodically evaluate the effectiveness of the program within his area of jurisdiction.
- b. The Associate Administrators, the Regional Directors, and the Directors of the Aeronautical Center and NAFEC are responsible for conducting the program within their areas of jurisdiction. The duties of each of these officials are the same as those indicated for the Deputy Administrator in "a." above.
- c. The Associate Administrator for Personnel and Training shall:
 - (1) Provide overall program guidance.
 - (2) Provide staff assistance in promoting understanding of the program.
 - (3) Evaluate the overall effectiveness of the program.

20. RESPONSIBILITIES OF PARTICIPANTS IN THE RATING PROCESS.

- a. The Employee Must:
 - (1) Request clarification from his supervisor of any work requirements which are not clearly understood.
 - (2) Inform his supervisor of any facts or circumstances which should be taken into account in evaluating his job performance.
 - (3) Develop and maintain a positive attitude and otherwise cooperate in the appraisal process so that it becomes increasingly constructive in accomplishing its aims.

- (4) Request a discussion of his performance rating if a discussion is not initiated by the rating official.

b. The Rating Official Must:

- (1) Establish written performance standards with each employee he supervises.
- (2) Make positive use of performance standards to fairly appraise the employee's performance.
- (3) Rate each employee whose work he is immediately responsible for.
- (4) Discuss the rating with the employee in a positive manner.
- (5) Perform other duties related to the performance rating process as set forth in this handbook.

c. The Reviewing Official Must:

- (1) Insure that appropriate and uniform rating practices are applied by all rating officials supervised.
- (2) Review and discuss with rating officials the ratings they recommend and the basis for their recommendations.
- (3) Appropriately suggest changes to ratings found unsupportable.

d. The Approving Official Must:

- (1) Establish and maintain equitable rating policies and practices in the use of ratings, particularly outstanding ratings, in his organizational area.
- (2) Assure that employees who receive outstanding ratings have exceeded the normal requirements for satisfactory performance to the extent of deserving special commendation.
- (3) Approve or disapprove unsatisfactory and outstanding performance ratings.

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Appendix 1
Page 1

OPTIONAL FORM 6		PERFORMANCE RATING APPEAL (Submit appeal in quadruplicate)		5010-10
1. TO BOARD OF REVIEW FOR (write in name of your agency)		2. NAME OF APPELLANT		
3. ORGANIZATION (Bureau, Division, Section, or Unit)		4. HOME ADDRESS OF APPELLANT		
5. ADJECTIVE RATING APPEALED	6. ADJECTIVE RATING DESIRED	7. HOME TELEPHONE	8. OFFICE TELEPHONE EXTENSION	
9. RATING PERIOD ENDED	10. DATE NOTICE RECEIVED	11. POSITION HELD AT TIME OF RATING		
12. WAS RATING APPEALED ADMINISTRATIVELY? YES NO	13. DATE NOTICE OF RESULT OF ADMINISTRATIVE APPEAL RECEIVED	14. SERVICE FIELD DEPARTMENTAL	15. CLASSIFICATION GRADE	
16. REASON FOR APPEAL				
17. DATE		18. SIGNATURE OF APPELLANT		
<p>All communications to boards of review located in the Washington, D.C., Metropolitan Area should be addressed simply: PERFORMANCE RATING BOARD OF REVIEW, c/o UNITED STATES CIVIL SERVICE COMMISSION, WASHINGTON 25, D.C. Communications to boards of review located outside the Washington, D.C., Metropolitan Area should be addressed simply: PERFORMANCE RATING BOARD OF REVIEW, c/o the Civil Service Region having jurisdiction over the place where the board of review is located.</p>				

ORDER

FEDERAL AVIATION AGENCY
WASHINGTON, D. C.

3430. 2

1/4/66

SUBJ: EMPLOYEE APPRAISAL CONSOLIDATION

1. PURPOSE. This order transmits the Agency Handbook on Employee Appraisal Consolidation.
2. CANCELLATION.
Agency Order 3330.12, Preparation of Personnel Data Summary,
FAA Form 2062.
3. REFERENCES.
 - a. Agency Handbook 3430.1, Employee Performance Rating.
 - b. Agency Order PT 3550.7, Acceptable Level of Competence for Within-Grade Increases.
 - c. Agency Handbook PT P 3400.2, Employee Performance Improvement.
 - d. Agency Handbook PT P 3330.1A, Merit Promotion Program.
 - e. Agency Handbook PT P 3450.2A, Recognition and Awards Program.
 - f. Agency Handbook 3410.4, Career Planning Program.

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CHAPTER 1. GENERAL PROVISIONS

1. PURPOSE OF HANDBOOK. This handbook introduces the employee appraisal record to be used in consolidating the annual documentation of various appraisals for each Agency employee. It also provides guidelines for completing the employee appraisal record.
2. POLICY. The Federal Aviation Agency requires each supervisor to consolidate his evaluations of each of his employees annually on the employee's individualized appraisal date.
3. INDIVIDUALIZED APPRAISAL DATE. The employee's individualized appraisal date is the date on which his supervisor completes the employee's appraisal record. That date must occur not more than 60 nor less than 10 days before the anniversary date of the employee's appointment or last regular pay action (whichever was more recent).

Wageboard employees will be evaluated not more than 60 nor less than 10 days preceding the due date of each regular within-grade salary increase and, thereafter, prior to the anniversary date of the final within-grade increase.

4. EMPLOYEE APPRAISAL RECORD. The appraisals that are documented for each employee shall be recorded annually on the appropriate employee appraisal record.
 - a. Nonsupervisory employees below grade GS-14 shall have their appraisals recorded on the Employee Appraisal Record for Nonsupervisory Employees, FAA Form 3693.
 - b. Supervisory employees and all employees grades GS-14 and above, except certain top executives, shall have their appraisals recorded on the Employee Appraisal Record for Managerial Employees, FAA Form 3693-1. For the purposes of this handbook, a supervisory position is one requiring the full range of supervisory responsibilities, including assigning performance ratings and certifying acceptable level of competence.
 - c. Certain top executives (the Deputy Administrator, the Associate Administrators, office and service heads, and the directors of the regions, Aeronautical Center, and NAFEC) shall have their appraisals recorded on the Executive Appraisal Record, FAA Form 3693-2.
 - d. Wageboard employees may have their appraisals recorded on FAA Form 3693 or 3693-1 as appropriate.

5. BACKGROUND.

a. Need for Effective Appraisals.

The employee, his supervisor, and Agency management in general, benefit from effective employee appraisals. The employee needs to have his performance fairly and effectively appraised to receive day to day job satisfaction, to know that his efforts are appreciated and recognized, and to be assured that he will be considered fairly for other jobs in which he may be interested. This handbook provides aids and guidelines for streamlining and making more effective what is already required. It does not add to the paperwork burden. It eliminates some of it.

An effective appraisal is necessary if the supervisor is to help the employee achieve excellence and to recognize and reward such performance. Also, wise selections for job openings depend upon adequate information about the employee's abilities and characteristics which can be documented in effective employee appraisals. Management must have this information available when making promotions or reassignments if it is to effectively and efficiently use its workforce.

b. Combining and Consolidating Appraisals, Reports, and Records.

In the past, each employee's performance was appraised for various purposes at different times throughout the year. The results of the appraisals were reported and recorded on different forms, in different ways. This handbook provides directions for the completion of the employee appraisal record which will serve as a single documentation of appraisals for each employee, once each year, to meet several requirements.

c. Relationship of Appraisals to the Performance Improvement Program.

Appraisals for the various purposes have one common denominator--the need for a "benchmark" against which performance can be appraised. Such a benchmark is provided through the development of an understanding between the employee and his supervisor as to the results expected on the job. Guides for developing such an understanding (which we call performance standards) are contained in Chapter 3 of Agency Handbook PT P 3400.2, Employee Performance Improvement. The PRIMARY PURPOSE of performance standards established in line with the handbook's directions is to provide a basis for helping the employee IMPROVE PERFORMANCE. However, these same standards can be used and should be helpful in appraising performance.

6. APPRAISALS INVOLVED.

a. Performance Rating. The Performance Rating Act of 1950 requires each supervisor to evaluate the performance of those he supervises and periodically assign a performance rating.

- b. Acceptable Level of Competence Determination. The Salary Reform Act of 1962 also requires a determination that the employee is performing at an acceptable level of competence before he is granted a within-grade increase.
 - c. Evaluation for Merit Promotion. The employee must be appraised to predict his probable performance in other jobs, whenever he is being considered for an opening.
 - d. Determination of Training Needs. To help in planning formal (and informal) training programs, the supervisor must evaluate employee performance--what elements of his performance could be improved through training? Determining employee training needs is a positive supervisory requirement.
 - e. Career Planning. The Agency needs to have the employee's performance evaluated periodically to estimate his long-range career potential. This is part of the effort to determine and make the best use of our workforce.
 - f. Recognition and Awards. Appraisals also help provide a basis for giving formal recognition and awards to the deserving employee. This use of appraisals does not occur regularly but the supervisor needs, on a regular basis, to consider recognizing and appropriately rewarding the employee if his performance merits such recognition and award.
7. APPRAISALS NOT INVOLVED. In addition to those appraisals involved in the consolidated employee appraisal record, some parts of the Agency require appraisals for other purposes. For example, Air Traffic Control Specialists at certain levels have their performance appraised as a regulatory check on their proficiency. Electronic maintenance technicians have their performance appraised to determine their competence for certification. Such specialized appraisals are not affected by this handbook.

CHAPTER 2. RESPONSIBILITIES

8. THE DEPUTY ADMINISTRATOR AND THE ASSOCIATE ADMINISTRATORS have overall responsibility for appraisal consolidation.
9. REGIONAL DIRECTORS, THE DIRECTORS OF THE AERONAUTICAL CENTER, BNCA, AND NAFEC, AND THE MANAGER, HEADQUARTERS OPERATIONS are responsible for employee appraisal consolidation within their areas of jurisdiction, They shall:
 - a. Keep employees and supervisors informed as to how appraisal consolidation activities are to be carried out.
 - b. Establish, as necessary, appropriate policies and procedures consistent with the objectives outlined in this handbook.
 - c. Insure that supervisors are notified well in advance of the due dates for appraisal records of persons under their respective jurisdictions.
 - d. Periodically evaluate the effectiveness of appraisals in their areas of jurisdiction.
10. THE ASSOCIATE ADMINISTRATOR FOR PERSONNEL AND TRAINING shall:
 - a. Provide overall guidance in appraisal consolidation.
 - b. Provide staff assistance in promoting understanding of the appraisal consolidation.
 - c. Evaluate the overall effectiveness of appraisal consolidation.
11. EACH FAA SUPERVISOR shall:
 - a. Complete the appropriate appraisal form within the time limits established in paragraph 3 of this handbook.
 - b. Maintain an awareness of the employee's rights to review or appeal and be prepared to discuss these with the employee.
12. EACH FAA EMPLOYEE shall:
 - a. Complete Part I of the employee appraisal record before the appraisal discussion with his supervisor.
 - b. Familiarize himself with the rest of his employee appraisal record so that he can take an active part in the appraisal discussion with his supervisor.

CHAPTER 3. APPRAISAL DOCUMENTATION PROCEDURES

13. NOTIFICATION. Upon notification that an annual appraisal is due, the supervisor will obtain FAA Form 3693 or FAA Form 3693.1 as appropriate, establish an interview date and time, and give the record to the employee for completion of Part I.
14. PART I - EMPLOYEE CAREER PLAN. This part is to be completed by the employee and returned to his supervisor before the scheduled interview. The supervisor should not assist the employee.

Part I is designed to stimulate discussion between the first level supervisor and the employee.

- a. Question One is an indicator for use in later discussions with the supervisor and for the information of selecting officials considering the employee. The employee is encouraged to reply in whatever manner he chooses to represent his conclusion. Answers such as "no change at present," "supervisor's position," "a change in line of work," and others are encouraged. The most explicit answer possible is requested.
 - b. Question Two only asks for a statement of opinion by the employee.
 - c. Question Three is to bring out the self-development plan of the employee and may constitute an important point for discussion with the supervisor.
 - d. Question Four is designed to make the employee think about his attitude toward improving his qualifications through transferring to another location or line of work.
 - e. Question Five is designed to insure that the employee's record of training (especially self-sponsored training) is kept up to date.
 - f. Question Six is to stimulate discussion between the employee and the supervisor regarding the availability and appropriateness of Agency training and distinctions between that training which the Agency can provide and that training which the employee must provide for himself.
15. PART II - CAREER POTENTIAL. The employee's immediate supervisor completes this part by carefully reading each item and placing a check mark on each heavy line at whatever point most accurately describes the employee. The check mark need not be directly above any one adjectival description. Each item should be completed based on the supervisor's current observation of the employee.

Part II replaces all other forms of promotion appraisal. Selecting officials will be asked to identify on SF-52 which of the characteristics measured are essential in the job to be filled. For example, the job may require an individual who is rated very high in questions one, six, and ten. Ratings on the remaining characteristics may be secondary or of little importance in the job. Therefore, employees rated high on the mandatory elements are prime candidates for the job. There are many different jobs in the Agency and different requirements for these jobs. Rating an employee accurately on each characteristic will help the Agency identify those employees who will be most effective in the job to be filled. It will also improve the employee's chances for success in a new assignment.

16. PART III - EMPLOYEE DEVELOPMENT. This part represents the supervisor's view on the development of the employee. Answers need not agree with the statements of the employee in Part I.

Part III is intended to provide a course of action for the employee which will assist him in his overall developmental activities. Conclusions made in this part should establish a course of action for the next year.

- a. Question One must be answered to reflect the supervisor's exact opinion of the employee. Answers such as "supervisory position" or "same position" are acceptable. The more explicit the answer, the more valuable the information.
- b. Question Two requests the supervisor to commit himself to a course of action concerning the employee. This should be based on actions the supervisor can control. For example, various special assignments may be effected by the supervisor to improve the overall qualifications of the employee.
- c. Question Three is intended to determine whether a need for reassignment is apparent or whether sufficient opportunity for further development is still present in the current job.
- d. Question Four is a follow-up of question three in the event a reassignment is needed for further development of the employee.
- e. Question Five. The supervisor should list training courses that he can identify by title and number. From information available to the supervisor concerning courses offered by the Agency, he should identify any training which would benefit the Agency and the employee. The replies to this question and question six are used in establishing training requirements and in nominating individuals for Agency sponsored training courses.

- f. Question Six requests titles or descriptions of training courses or other development that the supervisor cannot identify by specific title and number.
 - g. Question Seven is to provide a record of any formal awards or special achievements gained by the employee during the past year.
 - h. Question Eight requests identification of outside activities which may have contributed to the employee's career potential.
 - i. Question Nine should be answered to represent the supervisor's knowledge and observation of the employee. The supervisor might be influenced by the frequency of sick leave taken by the employee or the employee's reaction to certain requirements of his job.
 - j. Item Ten. Here the supervisor may make any comments he wants to about the employee.
17. PART IV - PERFORMANCE. The supervisor lists the key result areas from the employee's performance standards which were developed in accordance with Chapter 3 of FAA Handbook PT P 3400.2, Employee Performance Improvement. He must then evaluate the employee's performance, on the basis of results required in each key result area, and place a check mark in the appropriate space.

If performance standards have not been established, the supervisor and the employee should identify key result areas and establish standards before completing this part. Measurements are made in terms of these requirements of the position, and judgments should be governed accordingly.

Part IV serves as a guide for recommendations concerning incentive awards; outstanding, satisfactory, or unsatisfactory performance ratings; acceptable level of competence determinations; employee recognition; and is information to be considered in promotions. All judgments made in this part must be based specifically on the requirements of the position.

18. PART V - CERTIFICATIONS. In this part, the supervisor checks the appropriate blocks to indicate his certification of the employee's level of competence and annual performance rating. His judgment must be based on the employee's performance in his present job as determined in Part IV.

Part V certifications are required by law. The supervisor must inform the employee of his rights of review and appeal of both the certification of level of competence and the certification of annual performance rating.

a. Acceptable Level of Competence Certification.

- (1) If the supervisor determines that the employee's performance is of an acceptable level of competence, the employee will be given his regular within-grade salary increase.
- (2) If the supervisor determines that the employee is not working at an acceptable level of competence, he must discuss his reasons with the employee and notify the employee in writing, in accordance with the Agency directive on Acceptable Level of Competence for Within-Grade Increases, that he is withholding a within-grade increase.

b. Annual Performance Rating Certification.

- (1) If the supervisor certifies that the employee's performance has been satisfactory, the supervisor is required only to place a check mark in the appropriate block.
- (2) If he determines that the employee's performance is unsatisfactory, the supervisor must attach a copy of the 90 day warning notice which was given to the employee and a written justification for an unsatisfactory rating. If the 90 day warning period has not expired when the employee's appraisal date occurs, the rating must be postponed until the period has expired. (See PT P 3550.7, paragraph 6, for the relationship of a performance rating and an acceptable level of competence.)
- (3) If the supervisor determines that the employee's performance is outstanding, the completed employee appraisal record may serve as a part of his justification in recommending an outstanding performance rating. He must attach a memorandum to the completed record outlining all areas of the job and in what respect the employee was outstanding in all requirements.

NOTE: A performance rating of outstanding or unsatisfactory becomes official when a written justification of it has been approved by the appropriate approving official. (See FAA Handbook 3430.1, Employee Performance Rating.)

19. PART VI - REVIEWS. This part is filled in by persons who review the completed appraisal record.

- a. Employee Review. The employee is entitled to review the completed appraisal record. Neither the employee review nor subsequent reviews of this document constitute a request for an Agency review or formal appeal of the certification contained in Part V. The employee must initiate a separate action for Agency review or formal appeal certifications in Part V. The employee should consult his supervisor or personnel office for review and appeal procedures.

The employee's signature indicates that he has reviewed the completed appraisal record and it has been discussed with him. When the employee and his supervisor are geographically separated, the supervisor may discuss the completed record in a memorandum to the employee.

The space headed EMPLOYEE REMARKS is for the employee to document his comments, if he wishes, or point out particular portions of the appraisal record to his second level supervisor.

- b. Second Level Supervisory Review. This section is completed by the employee's second level supervisor. The second level supervisor must insure that the employee is notified of any differences in the appraisal when such a review is made. The second level supervisor must note in the remarks section or in a separate attachment any differences in the appraisal. The desired result is to obtain both supervisory viewpoints.
 - c. For Proposed Unsatisfactory or Outstanding Ratings Only. This section must be completed when the supervisor certifies that the employee's performance has been unsatisfactory or outstanding. Either such proposed rating must be accompanied by a written justification.
20. REMARKS. This section is to be used by the supervisor to supplement his remarks on the strengths and weaknesses of the employee which he may have started at the end of Part III. Any remarks made on the appraisal record by the supervisor must be completed before the appraisal record is reviewed by the employee.

This section may also be used to include any comments by the second level supervisor.

21. SUMMARY OF THE APPRAISAL DOCUMENTATION PROCESS.

- a. The supervisor is notified AT LEAST 90 days in advance of a particular employee's anniversary date.
- b. The supervisor gives a copy of the appropriate employee appraisal record to the employee, instructs him to complete Part I, and establishes a date, time, and place for the appraisal discussion.
- c. The employee completes Part I and familiarizes himself with the entire record.
- d. The appraisal discussion is held, and the supervisor completes Parts II through V of the appraisal record either during the discussion or immediately afterward.
- e. The employee reviews the completed record and signs to indicate he has seen the appraisal and it has been discussed with him.

- f. The completed appraisal record, after all of the required reviews have been made, is forwarded to the servicing personnel office, where it becomes a part of the employee's official personnel folder and is retained with all previous employee appraisals.

NOTE: The employee must be advised of any changes made on the employee appraisal record after the record has been reviewed and signed by the employee.

- 22. DISTRIBUTION. An original of the employee appraisal record is required. Copies may be made at the option of the supervisor but are not required for submission. The original employee appraisal record is submitted directly to the servicing personnel office after the required reviews have been made. Completion of the employee appraisal record other than at scheduled times should be limited to those instances where the supervisor feels that major and significant changes compel documentation of change. The appraisal record should be forwarded in a sealed envelope, suitably marked, to assure that the data remains confidential.

NOTE: Copies of employee appraisal records for all GS-14's and above are required by ESIS (Executive Selection and Inventory System) Central, PT-73. Appropriate servicing personnel offices should forward such appraisal records in sealed envelopes, suitably marked to assure that the data remains confidential.

CHAPTER 4. EXECUTIVE APPRAISAL DOCUMENTATION

23. GENERAL. The Executive Appraisal Record, FAA Form 3693.2, is designed to provide the Administrator and the Deputy Administrator with qualitative information on certain top Agency executives. The top executives concerned are identified in paragraph 4c of this handbook.
24. COMPLETING THE APPRAISAL. The appraisal record, which has four parts that are similar to the first four parts of the employee appraisal record described in chapter 3, is sent directly to the executive by the appropriate personnel office.
- a. The Appraisee completes Part I by representing his best thoughts in response to each question.
 - b. The Appraisor is the appraisee's immediate supervisor. He completes Parts II, III, and IV of the Executive Appraisal Record.
 - (1) Part II. A check mark should be placed on the heavy line of each item at the point which most accurately describes the appraisee. It is not necessary for the check mark to be directly above any one adjectival description.
 - (2) Part III. The appraisor should answer these questions to represent his best judgment. The intent of this part is to provide possible courses of action which will assist the executive in overall developmental activities.
 - (3) Part IV. The appraisor lists what he considers to be the Key Elements in the mission of the appraisee's organization and evaluates his performance according to how well he meets his responsibilities. The remarks section should include anything else of significance about the appraisee's potential, background, or any other characteristics.
- An annual performance rating of Satisfactory, Unsatisfactory, or Outstanding should be assigned in accordance with Agency performance rating policy, FAA Handbook 3430.1, Employee Performance Rating.
25. DISCUSSIONS. This appraisal does not envision secret ratings. Discussion of the completed appraisal with the appraisee is mandatory. The appraisor must discuss the total appraisal to the extent he considers profitable.
26. FORWARDING THE APPRAISAL. The Associate Administrators and the Deputy Administrator are requested to forward the Executive Appraisal to the Associate Administrator for Personnel and Training immediately after completion. The Appraisal should be forwarded in a sealed envelope, suitably marked, to assure that the data remains confidential.



IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 23408
(C. A. 2307-68)

United States Court of Appeals
for the District of Columbia Circuit

DONALD E. DONOVAN,

v.

UNITED STATES OF AMERICA, et al.

FILED JUL 30 1970
Appellee

Nathan J. Paulson
CLERK
Appellant

SUGGESTION FOR REHEARING EN BANC OR PETITION FOR REHEARING

Appellee suggests a rehearing en banc or petition for rehearing for the vital issues raised in the decision of July 16, 1970, for the following reasons.

1. Genesis reveals the core of this case. It says:

"And the Lord said unto Cain, Where is Abel thy brother? And he said, I know not; am I my brother's keeper?"

The decision lightly goes over very grave issues, responsibility of the Government and its supervision and training requirements to new employees. The case cannot lightly be dismissed by saying that the Sovereign can do no wrong, when it is bound by its own regulations, and laws as well as the citizen, *Service v. Dulles*, 354 U.S. 363 (1957).

Medoff v. Freeman, 362 F 2d. 472 (1969) and *Jaeger v. Freeman*, 410 F 2d. 528 (1969) deal with probationary employees, but not with the issues of due process and the equal protection of the laws.

In Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60, Chief Justice Marshall has answered the issues of training and supervision of federal employees.

Chief Justice Marshall stated:

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he received an injury. One of the first duties of government is to afford that protection. In Great Britain, the king, himself, is sued in the respectful form of a petition, and he never fails to comply with the Judgment of the Court.

"In the 3d vol. of his Commentaries, p. 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.

"'In all other cases,' he says, 'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded.'

"And afterwards, p. 109, of the same vol. he says, 'I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark that all possible injuries whatsoever that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.'

"The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.

"If this obloquy is to be case on the jurisprudence of our country, it must arise from the peculiar character of the case.

"It behooves us then, to inquire whether there be in its composition any ingredient which shall exempt it from legal investigations, or exclude the injured party from legal redress. In pursuing this inquiry the first question which presents itself is, whether this can be arranged with that class of cases which come under the description of *damnum absque*

injuria; a loss without an injury."

Under the circumstances, the issues raised are vital as the story of Cain and Abel and should be heard by the Court en banc.

Respectfully submitted,

Donald H. Dalton

Donald H. Dalton
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that I have personally served a copy of the foregoing Suggestion For Rehearing En Banc Or Petition For Rehearing on the Honorable Thomas A. Flannery, United States Attorney, U.S. Court House, Washington, D.C. on this 30th day of July, 1970.

Donald H. Dalton
Donald H. Dalton
Attorney for Appellee

No. 23,408

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DONALD E. DONOVAN,

Plaintiff-appellee,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-appellants

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANTS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

FILED MAR 6 1970

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* Cases and authorities chiefly relied upon are marked by asterisks.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,408

DONALD E. DONOVAN, Plaintiff-appellee,

v.

UNITED STATES OF AMERICA, et al., Defendants-appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANTS

Introduction

In our main brief, we demonstrated that the FAA Handbook was not intended to supersede or modify the discharge procedures for probationary employees. We also pointed to strong reasons militating against the establishment of a training prerequisite to the dismissal of probationary employees. We noted, too, that the only decided cases concerning the rights of probationers had recognized the cogent reasons underlying their strictly conditional status.

In his brief, the appellee has not answered these arguments. Nor has he challenged the finding that he was incapable of performing his duties satisfactorily. Donovan does not complain that the procedures that Congress and the President have provided for dismissing probationary employees are invalid or defective in any way, although those procedures are premised on precisely the same conditional status of probationers that dictates the result in this case. Rather, relying on the training responsibilities entrusted to his superiors, Donovan seeks to incorporate additional requirements into the discharge procedures. As we shall now show, his brief presents no persuasive reason to alter the present rules applicable to probationary employees.

1. Donovan's basic contention is that the FAA Handbook constitutes a regulation and that the directions admonishing superiors to train their personnel inure to the benefit of probationary employees who are found incapable of performing their duties and who would otherwise be subject to dismissal. By its terms, however, the Handbook speaks to supervisors; there is no reason to think that the agency's intention was to allow non-supervisory personnel to take advantage of its provisions.^{1/} There is, on the contrary, every reason to

^{1/} "Informal memoranda or documents of this kind seemingly directed only at internal management do not confer substantive rights on employees to recover lost salary whenever some suggestion or working rule contained therein is not observed by a supervisor. Even a deviation from a formal regulation does not vest rights in third parties when the regulation is issued
(continued)

interpret the Handbook not to derogate from the elaborate pattern of personnel regulations promulgated by the Civil Service Commission, 5 C.F.R., Chapter 1, Part 315, unless the Handbook were to manifest such an intention in explicit terms. Clearly it does not.

Donovan attempts to avoid the language and purposes of the Handbook by labelling it a "regulation." Since regulations must be followed, his argument goes, so must the Handbook, and no employee may be discharged if the training provisions are not met. Donovan relies heavily on Thorpe v. Housing Authority, 393 U.S. 268 (1969).

Thorpe involved a circular from the Department of Housing and Urban Development. The circular directed local housing authorities operating with federal funds to inform a tenant before eviction of the reasons for the action to be taken, and to afford him an opportunity to reply. The Court held that the circular was intended to alter the power of the authority to evict tenants without specifying reasons.

The plain purpose of the circular in Thorpe was to benefit tenants in federally-assisted housing projects. The aim and effect was to add a procedural amendment for the protection of tenants. Provisions imposing requirements of notice and hearing as prerequisites to official action obviously confer rights of which the beneficiaries may avail themselves. Compliance with such procedural regulations

(Footnote 1 continued) merely for the guidance of certain agency personnel." Greenway v. United States, 175 Ct. Cl. 350, 362 n. 5 (1966), certiorari denied, 385 U.S. 881 (1966) (citations omitted). See also Piccone v. United States, 407 F. 2d 866, 876-79 (Ct. Cl. 1969) (concurring opinion).

may be made a condition precedent to administrative action.^{2/}
But whereas the eviction regulations in Thorpe were clearly imposed in the interest of tenants, the FAA training provisions are designed to benefit the FAA, not its employees. The duties imposed by the Handbook on supervisors run entirely to the agency, not to their subordinates. The language of the Handbook provisions may be "commanding; their formulations official" (App. 72). But that is not sufficient to find, as the court below erroneously did, that they give rise to a "right to training" (App. 70). No such right can be found anywhere in the applicable statute or regulations or in the Handbook.

Moreover, the main issue in Thorpe was whether the HUD circular was mandatory or advisory. There is no such issue here. If the HUD circular were found to be mandatory, there was no question on whom it conferred rights. However mandatory the FAA Handbook is, it still manifests no intention to affect disciplinary proceedings or confer any rights on employees.^{3/}

^{2/} Indeed, the procedural provision of notice in writing, consisting of "the agency's conclusions as to the inadequacies of his performance or conduct," is applicable to dismissals of probationary federal employees. 5 C.F.R. § 315.804. As Donovan admits, these procedures have been fully complied with here.

^{3/} The Court in Thorpe indicated that the effect of the circular was to be judged from the face of the document and its administrative interpretation. 393 U.S. at 274-76. Neither the FAA Handbook nor the agency's construction of it imposes any conditions precedent to discharge.

The reliance that Donovan's syllogism puts on Thorpe is entirely misplaced.

2. In our opening brief we cited Jaeger v. Freeman, 410 F. 2d 528 (C.A. 5, 1969); and Medoff v. Freeman, 362 F. 2d 472 (C.A. 1, 1966), as the only cases dealing with the rights of probationary employees. Both courts rejected the claim that probationary employees were entitled to protections similar to those accorded permanent employees. Donovan seeks to distinguish those cases on the ground that they involved only procedural rights, as of course they did. But the distinction is not availing. If a probationary employee is not entitled to a hearing before his dismissal, a fortiori he is not entitled to impose substantive conditions precedent to his dismissal, other than those that may be found in the regulations.

More fundamentally, Jaeger and Medoff rest on the sound policy considerations that underlie the distinction between probationary and career employees. As the court stated in Jaeger:

There is ample basis for Congress's concluding that a healthy Civil Service System affording genuine tenure and security to career employees would itself be jeopardized or weakened by denying the Government the benefit available in nearly all selective programs of testing the competency and capacity of the new employee during a fixed but limited probationary or trial period.

410 F. 2d at 531.

Similar considerations were articulated by the Civil Service Commission Board of Appeals and Review when it declined jurisdiction to review Donovan's case:

The Commission regards the probationary period as a highly significant step in the examining process. It provides a final indispensable test, that of actual performance on the job, which no preliminary testing methods can approach in validity. During the probationary period the employee's conduct and performance in the actual duties of his position are observed by the supervisor and he may be separated from the service without undue formality if the circumstances warrant. Termination action may be initiated whenever the probationer's work performance or conduct fails to demonstrate his fitness or his qualifications for continued Federal employment.

App. 63-64.

The very concept of probation denotes a trial period to test the employee's performance.^{4/} The Civil Service regulations specifically provide that "[t]he agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment." 5 C.F.R. § 315.803. Clearly, the burden is on the employee to demonstrate his competence during the first year, so that the job security provided by Civil Service protection in subsequent years may be afforded without too high a cost in the competence of the

^{4/} "The probationary period is the last and indispensable test for Government employment as well as the final selection process." U.S. Civil Service Commission, Personnel Management Series No. 20, The Probationary Period 2 (1967).

federal service.^{5/} The benefits of Civil Service protection may best be secured if the probationary period is utilized freely to assess the competence of entering employees. Congress recognized this when it provided that: "The President may prescribe rules, which shall provide, as nearly as conditions of good administration warrant, that there shall be a period of probation before an appointment in the competitive service becomes absolute." 5 U.S.C. § 3321.

Donovan does not contest the finding of his supervisors that his performance was not satisfactory. And there is, of course, no showing that additional training would have improved Donovan's aptitude for the job; indeed, since Donovan's deficiencies lay in the area of his writing ability, thoroughness, attention to detail, and analytical capacity, there is grave doubt that it could (see App. 9-15, 32-33). We stress that Donovan was not employed as a low-grade clerk and given difficult assignments incommensurate with his position. Nor were Donovan's duties so specialized or technical that they required a lengthy introduction. Donovan was hired as a General Business and Industry Officer at the GS-13 level (\$14,409 per annum at the time of his removal; App. 3), based on his long experience in the aviation procurement industry (App. 50). He proved unable to meet his responsibilities. To hold that he may not be discharged would be to require the

^{5/} Indeed, Donovan himself recognized that the burden rested on him when he stated, during a conference with his superiors, that he anticipated he would be able to "prove himself" within 3 1/2 months (App. 10).

government to retain incompetent employees permanently in the hope that some training program will compensate for their inadequacies.^{6/}

3. The FAA Handbook states that: "Determining employee training needs is a positive supervisory requirement." In his brief, Donovan suggests that the courts should oversee the fulfillment of this function. We do not agree. This is obviously a task that would place the courts in the position of having to determine which employee needed training and whether he had received enough training of the right kind. Some probationary employees may have potential ability that can be developed through training; others may not. Clearly, this is a managerial decision as inappropriate for adjudication as any question could be. By the same token, if the field involved happens to be a complex and technical one, the courts

^{6/} See U.S. Civil Service Commission, Personnel Management Series No. 20, The Probationary Period 1 (1967):

If at any time during this trial period it is decided that the employee won't be able to meet the established standard of performance, he should be separated; if it is decided that he will make a good employee, he should be recommended for a career in the Federal Service. It is an important decision and there is no substitute for wise judgment in making this decision. Separation of any employee is a distasteful task, but nevertheless it is one that must be undertaken whenever circumstances warrant. An inadequate employee who is not separated during the probationary period could remain on the Government payroll for many years, never bad enough to fire but always a marginal producer and a problem to subsequent supervisors.

(Emphasis supplied.)

will need to decide if a discharged probationary employee has received the right quantity and the right kind of training. We do not think that the courts would be willing or able to make these determinations for each of the thousands of probationary employees who are dismissed annually, or for that matter for career employees who may be dismissed for cause.

An illustration of the difficulties of such an approach is provided in the instant case. The district court seemed to draw an adverse inference from the allegations that Donovan's superior "was absent from the office for 89 days between September 25, 1967, and July 26, 1968" and that Donovan was not enrolled in a writing course although his supervisor had recommended him for one (App. 69, 73). To support such an adverse inference, a court would need to consider the nature of the supervisor's duties which took him away from the office, whether these were more important than his training responsibilities, the reasons why Donovan was not enrolled in the course, the extent to which the course might have helped him, and many other administrative matters.^{7/} In short, the entire work situation would be subject to judicial review. We submit that

^{7/} In contested cases, of course, all of these questions would have to be tried.

this is a patently undesirable result, totally at odds with the concept of probationary employment.

* * *

So far as we are aware, no court has ever held that training is a condition precedent to the discharge even of a career employee with protected tenure. Still less should this Court hold that it is a precondition to the discharge of a probationary employee. The FAA Handbook does not alter the regulations allowing dismissal of probationary employees for unsatisfactory work performance. The needs of an effective Civil Service counsel against any such modification. The court below inadvertantly placed its imprimatur on incompetence in the federal service and thrust itself deep into the details of the management process. Its decision was erroneous.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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